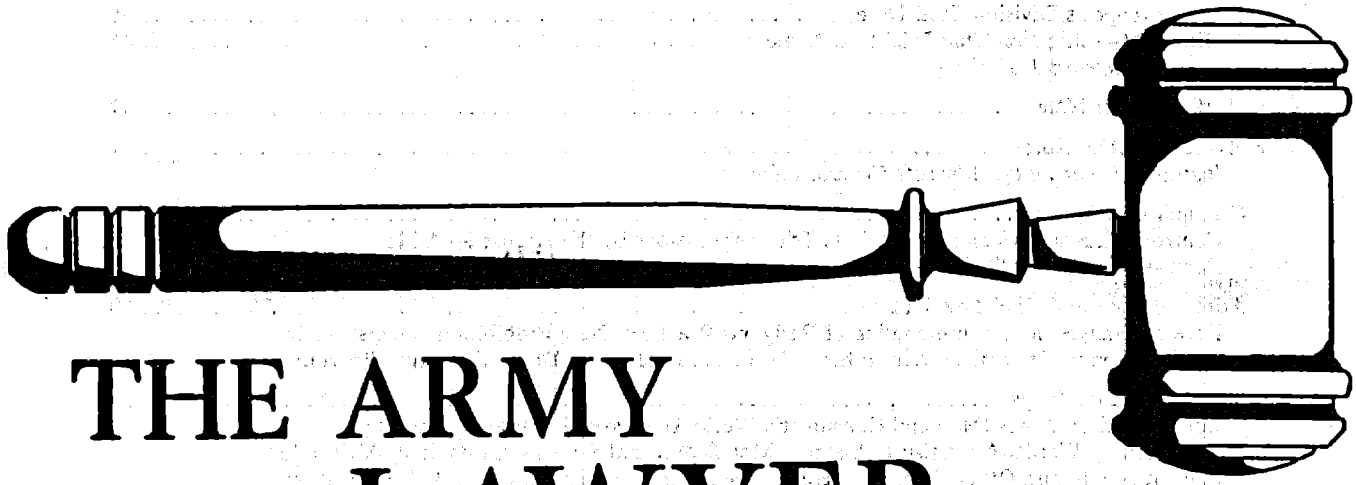

THE ARMY LAWYER

Headquarters, Department of the Army

Department of the Army Pamphlet 27–50–186

June 1988

Table of Contents

The Army Lawyer (ISSN 0364–1287)

Editor
Major Thomas J. Feeney

The Army Lawyer is published monthly by The Judge Advocate General's School for the official use of Army lawyers in the performance of their legal responsibilities. The opinions expressed by the authors in the articles, however, do not necessarily reflect the view of The Judge Advocate General or the Department of the Army. Masculine or feminine pronouns appearing in this pamphlet refer to both genders unless the context indicates another use.

The Army Lawyer welcomes articles on topics of interest to military lawyers. Articles should be typed doubled spaced and submitted to: Editor, *The Army Lawyer*, The Judge Advocate General's School, U.S. Army, Charlottesville, Virginia 22903–1781. Footnotes, if included, should be typed double-spaced on a separate sheet. Articles should follow *A Uniform System of Citation* (14th ed. 1986) and the *Uniform System of Military Citation* (TJAGSA, Oct. 1984). Manuscripts will be returned only upon specific request. No compensation can be paid for articles.

The Army Lawyer articles are indexed in the *Index to Legal Periodicals*, the *Current Law Index*, the *Legal Resources Index*, and the *Index to U.S. Government Periodicals*.

Individual paid subscriptions are available through the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.

Issues may be cited as The Army Lawyer, [date], at [page number].

Second-class postage paid at Charlottesville, VA and additional mailing offices. **POSTMASTER:** Send address changes to The Judge Advocate General's School, U.S. Army, Attn: JAGS-DDL, Charlottesville, VA 22903–1781.

The Trial of Major Henry Wirz—A National Disgrace*

Captain Glen W. LaForce
36th Graduate Course, The Judge Advocate General's School

Introduction

At exactly 10:32 a.m. the trap was sprung. The fall did not break his neck as the hangman's knot was intended to do and Henry Wirz's legs kicked and writhed within their bonds as he slowly strangled to death. The yard of the Old Capitol Prison was crowded with onlookers who gladly braved the slight chill of the November morning to watch Wirz go to his death. The 250 spectator tickets the government had issued were quickly snatched up; others watched the event from perches on nearby rooftops and in trees overlooking the walls. Four companies of United States soldiers stood guard and, as he was led up the scaffold, they began chanting in unison, "Wirz—remember—Andersonville." When the major commanding the execution detail told Wirz, "I have my orders," just before he put the black hood over Wirz's head, Major Wirz spoke his last words, "I know what orders are Major, and I am being hanged for obeying them."[1]

The mood of the crowd as they wandered away from the scene of the execution was one of satisfaction. For sixty-three days the trial of Confederate Major Henry Wirz had been front page news. The horrors of Andersonville were recounted in story after story. *Harper's Weekly* obtained photographs of some of the worst victims of the prison taken just after their release and published them on its front page.[2] The Union was outraged. The public clamor for revenge had grown daily and the target of the public's vengeance was the commander of the Andersonville prison, that "fiend incarnate,"[3] Henry Wirz. Walt Whitman wrote of Andersonville, "There are deeds, crimes that may be forgiven but this is not among them. It steeps its perpetrators in blackest, escapeless, endless damnation."[4] With the execution of that "devil" Wirz, the nation's thirst for vengeance had been satisfied. Justice had finally been done—or had it?

Background

Heinrick Hartmann Wirz was born on November 25, 1823 in Zurich, Switzerland. He was educated in Zurich, Turin, Italy, and Paris, studying first the mercantile field and later medicine.[5] He immigrated to the United States in 1849 and settled first in Cadiz, Kentucky, where he began a practice of medicine. He married a widow there in 1854, adopting her two young daughters. From that union one more daughter was born and Wirz moved with his wife and three daughters to Louisiana several years later.[6]

When the war broke out in 1861, Wirz gave up his medical practice to enlist in Company A, Fourth Battalion, Louisiana Volunteers.[7] He was given a battlefield commission for bravery in the Battle of Seven Pines near Richmond, Virginia, in the spring of 1862,[8] but he was also badly wounded. A rifle ball shattered his right arm; he never regained the full use of it. After being treated and released by the military hospital in Richmond, Wirz, now a captain, was assigned to duty at Libby Prison in Richmond working for General John H. Winder, Superintendent of Confederate Military Prisons. General Winder sent Wirz to inspect Confederate prisons in July of 1862 and then to command the Confederate prison at Tuscaloosa, Alabama.[9]

Because of his nationality and education (he could speak three languages fluently), Captain Wirz was summoned to Richmond in the summer of 1863 and sent on a secret mission. President Jefferson Davis made Captain Wirz a Special Minister plenipotentiary and sent him to Europe to carry secret dispatches to the Confederate Commissioners, Mister Mason in England and Mister Slidell in France.[10]

Captain Wirz returned from Europe in January of 1864 and reported back to Richmond, where he again worked for General Winder in the prison department. Three months later, on April 12, 1864, Captain Wirz received his ill-fated orders to report to Andersonville, Georgia, to command the military prison there.[11]

Andersonville

As the Confederacy's military fortunes declined in the latter part of the war, the necessity arose to construct new prisons farther removed from the front lines. The War Department in Richmond turned to the deep south as the logical choice, and found a suitable area in south Georgia.

Captains W. S. Winder and Boyce Charwick selected the site for Andersonville prison in November 1863.[12] The orders regarding the prison site selection called for, among

*This article was originally submitted as a research paper in partial satisfaction of the requirements of the 36th Judge Advocate Officer Graduate Course.

[1] Morsberger, *After Andersonville: The First War Crimes Trial*, Civil War Times Illustrated, July 1974, at 30–31.

[2] *Id.* at 31.

[3] O. Futch, History of Andersonville Prison 120 (1984).

[4] Morsberger, *supra* note 1, at 31.

[5] M. Rutherford, Andersonville Prison and Captain Henry Wirz Trial 3–4 (1921).

[6] O. Futch, *supra* note 3, at 17.

[7] M. Rutherford, *supra* note 5, at 4.

[8] *Id.* at 4.

[9] O. Futch, *supra* note 3, at 17.

[10] M. Rutherford, *supra* note 5, at 4. Students of Civil War history will recognize the names of Mason and Slidell from the famous *Trent* affair.

[11] *Id.* at 4.

[12] M. Kantor, Andersonville 16 (1955).

other things, "A healthy locality, plenty of pure, good water, a running stream."[13]

The choice of Andersonville was a natural one. The small community had been far removed from the fighting and offered a "salubrious climate."[14] The Georgia Southwestern Railway served the location, and the area offered an abundance of pine timber for the construction of the stockade. A clear and strong flowing stream, Sweetwater Creek, flowed through the site, and sufficient labor to erect the stockade could be made available by the impressment of slaves in the surrounding area.[15]

Construction began on the prison in December of 1863 and was still ongoing when the first load of prisoners, six-hundred men from Libby Prison in Richmond, arrived on February 24, 1864. One wall of the stockade had not yet been completed, and a twenty-four hour Confederate guard kept artillery pieces trained at the opening until the work was through.[16]

The prison was built to accommodate ten thousand prisoners.[17] Initially, the number of prisoners was small and conditions inside the prison were satisfactory. Things began to change rapidly, however. As the Confederacy's hopes dimmed in Virginia, thousands of prisoners were shipped to Andersonville. In addition, as the demands on Andersonville increased to provide for the prisoners' needs, the ability of the Confederates to obtain the necessary provisions was being eroded. When Captain Wirz reported for duty at Andersonville on April 12, 1864, General Lee's Army was being pressed hard in Virginia, the men often reduced to one quarter rations;[18] General William "War Is Hell" Sherman was closing in on General Joseph Johnston's greatly outnumbered Army, and the fall of Atlanta was less than five months away;[19] and, finally, the only regular soldiers assigned to guard duty at Andersonville would be shipped out in less than one month to front-line duty, leaving Wirz with nothing but a small force of untrained and undisciplined Georgia Home Reserves to guard the prison.[20]

Prison Life

Living conditions in the Andersonville Prison were undeniably bad. As the number of prisoners steadily increased, the conditions went from bad to worse. From the initial six hundred men in February, the prison population increased to two thousand in ten days. By the end of March there were twelve thousand. On May 15th the prison rolls listed nineteen thousand. By June 8th, the number of prisoners exceeded twenty-three thousand, and over one hundred a day were dying. The population reached its peak in August, when over thirty-three thousand soldiers were crowded into the Andersonville prison pen. By the end of September, most of the prisoners were transferred to other prisons and the stockade's population never exceeded four thousand again.[21]

The problems affecting the prisoners' lives were legion. As the number of prisoners grew, the available living space for each man shrank, until the amount of space for each soldier was less than six square feet.[22] The original interior of the stockade was sixteen and one half acres. In June, 1864, Captain Wirz supervised the enlargement of the stockade by ten acres,[23] but the relief was only temporary. The overcrowded condition affected every aspect of the prisoners' daily lives. The latrines were overtaxed, and human waste with its attendant complications of maggots and flies saturated one end of the stockade. The stream, which had been an ample water supply for ten thousand, soon became a sluggish swamp, no longer strong enough to carry away all of the waste from the latrine area. The primary water supply was polluted, adding to the spread of disease. Soldiers dug a number of wells inside the prison, but there were never enough to supply all of the drinking water needs of the entire population.[24]

Lack of shelter was another pressing problem. There were no barracks, and the supply of tents issued as shelter to the first prisoners was quickly exhausted. The few shade trees existing in the prison compound disappeared as the men cut them down to use the lumber for the erection of huts. Clothing and blankets were also in short supply. Many articles of clothing had been used by the prisoners to sew together patchwork tents called "shebangs"[25] to provide some measure of protection. Some soldiers dug underground shelters which turned into mud holes when it rained. Prolonged exposure to the elements took its toll on the men's health, especially when added to the other privations.

Perhaps the largest single problem the prisoners faced was their diet. Certainly some food items were scarce in Georgia in the summer of 1864 because of the military situation. Much to the credit of the Confederate quartermasters, however, the prisoners never went without rations.[26] The prisoners were issued the same daily ration as their Confederate guards. It was a meager one. It usually consisted of approximately two ounces of beef or pork, a

[13] J. Jones, Confederate View of the Treatment of Prisoners 161 (1876).

[14] S. Ashe, The Trial and Death of Henry Wirz 17 (1908).

[15] J. Jones, *supra* note 13, at 161.

[16] M. Kantor, *supra* note 12, at 114–115.

[17] M. Rutherford, *supra* note 5, at 17.

[18] *See* Davis, *Andersonville and Other War Prisons*, Belford's Magazine, January 1890, at 348.

[19] B. Catton, The Civil War 481 (1982).

[20] O. Futch, *supra* note 3, at 24.

[21] *Id.* at 44.

[22] *Id.*

[23] M. Rutherford, *supra* note 5, at 11.

[24] *See* O. Futch, *supra* note 3, at 30–45.

[25] A. Stearns, The Civil War Diary of Amos E. Stearns, A Prisoner at Andersonville 80 (1981).

[26] N. Chipman, The Tragedy of Andersonville 212 (1911).

small loaf of bread, some type of soup or rice, and condiments such as syrup, salt, or sugar, as available. Vegetables were available only infrequently and consisted primarily of potatoes, yams, beets, and peas.[27] It was not the quantity as much as the type of food that seems to have caused most of the problems. Scurvy became quite common due to the lack of fruits and vegetables. Also, the Northern soldiers were not used to eating cornbread. The coarse cornmeal-based bread was hard on their digestive systems. Wheat was not a southern crop, however, and the wheat-based bread that the Union soldiers were used to was not available. This foreign diet caused massive dysentery and diarrhea. In fact, dysentery was the leading cause of death.[28]

Conditions at the prison hospital were not much better. Located outside of the stockade walls, the hospital was also short of shelter, bedding, blankets, and everything else. About thirty Confederate surgeons, aided by paroled prisoners working as orderlies, labored around the clock to care for the thousands of sick and dying men. Medicine had been declared a contraband of war by the United States and was in very short supply.[29] Doctors tried to improvise by prescribing medicines made from local herbs, roots, and bark, but met with little success.[30]

The prisoners themselves posed a very real problem to each other. Not surprisingly, in a group of over twenty thousand men, there were more than a few unsavory characters. Gangs of marauding robbers and thieves terrorized other prisoners. A number of reports exist of prisoners being murdered in their sleep for a blanket, pocketwatch, or other small items of value.[31] One gang in particular, known as the "Raiders,"[32] became very powerful. In an attempt to fight back, some decent, law-abiding prisoners went to see Captain Wirz to solicit his help in the matter. How Wirz handled the problem will be discussed later.

After most of the prisoners were shipped to other prisons in September, 1864, conditions at Andersonville improved somewhat. In addition to more living space, barracks were constructed and physical improvements were made to the hospital. A tannery and a shoe shop were completed, providing much needed shoes for many of the men. Work was also done on the stream to improve drainage.[33]

With the surrender of General Johnston to General Sherman in North Carolina on April 20, 1865, the war came to an end. Confederate forces in Georgia were included in the terms of General Johnston's surrender.[34] As soon as the news reached Andersonville, the prison closed. The few remaining prisoners were sent by rail to Macon, where Union General Wilson had established his headquarters. During the fourteen months that the prison operated, a total of 45,613 men were imprisoned there. Of that number, 12,912 died.[35]

The Arrest

Wirz, promoted to major just prior to the war's end, remained in Andersonville with his family. Uncertain as to his future plans, he was considering a return to Europe, since the South had been devastated by the war.[36]

On May 7th, Wirz wrote a letter to General Wilson in Macon requesting his assistance. Wirz was concerned that some of the recently released prisoners would hold him responsible for their poor condition and try to harm him in some way. He wrote General Wilson that the shortcomings of the prison were beyond his control, and that he was merely a soldier who had done his duty to the best of his ability. He asked for a safe conduct pass or a guard to temporarily protect him.[37]

Upon receipt of the letter, General Wilson sent his aide-de-camp, Captain Henry Noyes, with several soldiers to Andersonville to arrest Wirz. Captain Noyes testified at Wirz's trial that he told Wirz that Wirz needed to accompany him to Macon for routine questioning. Noyes admitted that he told Wirz in the presence of his family that there was nothing to fear, and that after answering some routine questions he would be released.[38] Wirz gathered his official records, which he had saved, to take with him. Since the dinner hour was approaching, Wirz invited Captain Noyes to have dinner with his family before leaving. Noyes accepted and dined with the Wirz family before leaving for Macon. Wirz apologized for the meager fare served and explained the food shortage problem.[39] Little did Henry Wirz realize when he left his house after dinner that evening that he would never see his family again.

It seems clear that Wirz did not perceive the threat of criminal prosecution by the North. He had ample time and opportunity to leave the area and go into hiding, or possibly flee to another country as some ex-Confederates did. He remained in Andersonville for weeks after the surrender with no federal soldiers present at all. Rather than destroying the prison records, which he had the opportunity to do, he carefully preserved them and voluntarily submitted them to the Federal authorities when Captain Noyes came for him.

---

[27] *Id.* at 202.

[28] R. Stevenson, The Southern Side of Andersonville Prison 28 (1876).

[29] M. Rutherford, *supra* note 5, at 18; *see also* A. Stearns, *supra* note 25, at 79. To declare medicine a contraband of war or to deprive any needy persons of medicine would now be considered a violation of the law of war. *See generally* Dep't of Army, Field Manual No. 27–10, The Law of Land Warfare, para. 234 (July 1956).

[30] O. Futch, *supra* note 3, at 97–112.

[31] *Id.* at 63–75.

[32] *Id.* at 63–75.

[33] S. Ashe, *supra* note 14, at 14.

[34] 2 J. Davis, The Rise and Fall of the Confederate Government 678 (1881).

[35] J. Jones, *supra* note 15, at 216.

[36] N. Chipman, *supra* note 26, at 45.

[37] Trial of Henry Wirz, H.R. Exec. Doc. No. 23, 40th Cong., 2nd Sess. 8 (1868) [hereinafter *Trial*].

[38] *Trial, supra* note 37, at 18.

[39] M. Rutherford, *supra* note 5, at 5.

Even his arrest is directly attributable to his own letter for assistance, which notified the Union General Wilson of his whereabouts and reminded him of the situation. It seems very likely that if Wirz had kept silent, it would have been at least much later before any attempt to arrest him would have been made.

The Trial

From Macon, Wirz was shipped to the Capitol Prison in Washington where he remained throughout his trial. He was tried by a military commission, not a court-martial, composed of nine officers headed by Major General Lew Wallace.[40] The judge advocate who prosecuted the case was Colonel Norton Parker Chipman.[41] Wirz initially had five defense attorneys: Messieurs Hugh, Denver, Peck, Baker and Schade. The trial began on August 23, 1865, and ran until October 24th. A total of 160 witnesses testified; the record of trial is 2,301 pages long.[42]

From the beginning of the trial, Wirz's defense attorneys feared the worst. Lincoln's assassination had thrust the Radical element of the Republican party into control of the government. Secretary of War Stanton assumed tremendous power during the early tenure of President Johnson, which he wielded with a vengeance against the conquered Rebels.[43]

Stanton was determined to link Confederate President Jefferson Davis to Lincoln's assassination. A Bureau of Military Justice was formed, headed by The Judge Advocate General of the Army, Joseph Holt, which sought evidence implicating President Davis. The Bureaus located witnesses who testified that President Davis was involved in the conspiracy to kill Lincoln. Secretary Stanton offered a $100,000 reward for Davis's capture. Davis was captured and imprisoned at Fort Monroe, Virginia.[44]

A military commission tried the Lincoln conspirators, minus Jefferson Davis, from May to July, 1865. Eight defendants were convicted of conspiring with Jefferson Davis and other Confederate government leaders to murder Lincoln and other Northern leaders. Four of the eight were hanged.[45]

Despite the military commission's verdicts, Stanton realized that the evidence implicating Davis would not sustain a conviction. The government's witnesses against Davis were two manual laborers and a tavern keeper from New York whose testimony was so obviously false that Stanton refused to risk a trial.[46]

Frustrated in their attempts to link Davis to the Lincoln assassination, the leaders of the Radical Republicans saw Andersonville as the next target of opportunity. The same Bureau of Military Justice investigated the case against Wirz,[47] and it came as no surprise to Wirz's attorneys that the first of the two charges Wirz stood accused of was conspiracy to destroy prisoners' lives in violation of the laws and customs of war. The named co-conspirators included Jefferson Davis, Robert E. Lee, Confederate Secretary of War James Seddon, and a number of others.[48] When the verdict was returned, General Lee's name was dropped—probably because of the universal admiration his name inspired. Jefferson Davis, however, along with fourteen other named conspirators, was included in the finding of guilty.[49] That no other named conspirator was ever brought to trial says much about the quality of the government's evidence of a conspiracy.

The second charge against Wirz was murder in violation of the laws and customs of war. Contained in this charge were thirteen specifications alleging deaths caused by Wirz or guards acting on his orders.[50]

Before the taking of testimony began, the defense made several motions to dismiss.[51] The first motion was that the commission had no right to try Wirz because he had been included in the terms of the military surrender between Generals Sherman and Johnston. That surrender provided that once each soldier agreed in writing not to take up arms against the United States he would be permitted to return to his home, "not to be disturbed by the United States authorities so long as they observe their obligation and the laws in force where they may reside."[52] Because Wirz had complied with his obligation under the surrender, his subsequent arrest and trial was illegal, argued defense, as the effect of the surrender was to pardon the wartime acts of the accused.

Colonel Chipman argued to the commission that the surrender terms never intended to pardon soldiers who committed war crimes. Because Wirz was charged with law of war violations, the surrender afforded him no protection. The commission quite correctly denied the motion.

The second defense motion was that the military commission had no personal or subject matter jurisdiction to try the case.[53] Personal jurisdiction was lacking because Wirz was a naturalized citizen of the United States who had never served in the United States military. Subject matter jurisdiction was lacking because the war was over and

---

[40] *Trial, supra* note 37, at 2. This is the same Lew Wallace that later authored the novel, *Ben Hur*.

[41] *Id.* at 2.

[42] *Id.* at 846.

[43] S. Frank, The Conspiracy Against Jefferson Davis 11 (1987).

[44] *Id.* at 12–17.

[45] *Id.* at 16.

[46] *Id.* at 39.

[47] S. Ashe, *supra* note 14, at 24.

[48] *Id.* at 20.

[49] *Trial, supra* note 37, at 808.

[50] *Id.* at 5.

[51] *Id.* at 9.

[52] J. Davis, *supra* note 34, at 692.

[53] *Trial, supra* note 37, at 10.

Wirz was constitutionally entitled to a civil trial with a jury of his peers.

Although it is now well established that a military commission has the authority to try war crimes after the cessation of hostilities, such was not the case in 1865. Colonel Chipman appears to have been most concerned with this point; he devoted considerable argument to defending the jurisdiction of the commission.[54] The thrust of Chipman's argument was that a military tribunal was justified because, even though the war was over, the South was still a rebellious, armed camp, and the threat of war was very real.

Obviously Chipman prevailed, but it seems that a better argument would have been that the offenses were military in nature, war crimes, and therefore a military tribunal was better suited to handle the case. The Constitution certainly provides for military courts when the offenses involve military personnel.[55] International law recognizes that military commissions have the jurisdiction to try war criminals largely because of the precedent set by the *Wirz* case.

The last defense motion to dismiss was also the most meritorious. Defense argued that the charges should be dismissed because they were unconstitutionally vague and indefinite.[56] Incredibly, despite thirteen specific allegations of murder, not a single murder victim was named in the charges! Every specification alleged the murder of a United States soldier, "whose name is unknown."[57] This, even though the murders were supposed to have occurred in the immediate presence of thousands of eyewitnesses who were fellow comrades of the slain soldiers. Moreover, the Confederate authorities had carefully recorded the name of every soldier who died at Andersonville.[58] Chipman did not respond to this motion, and it was denied without comment.

At the conclusion of the defense motions, three of the five counsel for the defense withdrew from the case. Convinced that the conclusion was pre-ordained, attorneys Hugh, Denver, and Peck departed, leaving attorneys Baker and Schade to "battle it out" with the commission.[59] Battle is an appropriate word to describe the acrimonious exchanges that characterized the relations between the defense attorneys and the commission and the judge advocate. At one point, Baker and Schade quit after complaining bitterly of the deferential treatment shown prosecution witnesses, and the intimidation of defense witnesses by the commission. Only the pleading of Henry Wirz persuaded them to return.[60] At the conclusion of the trial, when the defense request for time to prepare its closing argument was denied, both attorneys had had enough and quit the case for good. The closing argument for defense as well as the prosecution ended up being handled by the same man, Colonel Chipman.[61]

The prosecution had a very simple strategy. Chipman created a "parade of horrors" as he called one witness after another to testify to the terrible conditions at Andersonville. All of the disease, malnutrition, filth, overcrowding, misery, and death was described in graphic detail. The judge advocate's message seemed to be, "Andersonville was horrible, therefore Wirz was horrible."

To establish the conspiracy, Chipman introduced letters from Wirz to the Department of Prisons in Richmond and inspection reports that Confederate inspectors general and surgeons had sent to the Confederate War Department. The letters and reports detailed the problems existing at Andersonville and made recommendations for improving the situation. Chipman's point was to show knowledge on the part of the Confederate government officials of the terrible condition of Andersonville, and therefore complicity.

What is remarkable about the documentary evidence introduced by Chipman on this point is what it proves for the defense. It shows that the Confederate government, despite all of its problems late in the war, continued to regulate and inspect its prisons with a view to improving their condition to the best of its ability. Of the inspection reports admitted, none were critical of Wirz, and several reports praised Wirz by name for his efforts. On May 5, 1864, Major General Howell Cobb wrote, "The duties of the inside command are admirably performed by Captain Wirz, whose place it would be difficult to fill."[62] On May 8, 1864, General Winder wrote, "Captain Wirz has proved himself to be a very diligent and efficient officer, whose superior in commanding prisoners and incident duties I know not."[63] Again on August 5, 1864, Colonel D. T. Chandler wrote, "Captain Henry Wirz, in immediate command of the prison, is entitled to commendation for his untiring energy and devotion to the discharge of the multifarious duties of his position, for which he is pre-eminently qualified."[64] Wirz's own letters to Richmond are all composed of reports of the condition of the prison followed by pleas for more food, tents, clothing, medicine, and supplies of all kinds[65]—hardly the stuff that a man would write who was intentionally destroying the lives of his prisoners.

Out of the 160 witnesses called, 145 testified that they had no knowledge of Wirz ever killing anyone or treating a

---

[54] *Id.* at 13–16.

[55] *See, e.g.*, U.S. Const. art. 1, § 8 & amend. V.

[56] *Trial, supra* note 37, at 10.

[57] *Id.* at 3–8.

[58] J. Jones, *supra* note 13, at 167. The names of the soldiers who died at Andersonville are well documented and plainly marked on the headstones of the graves in the Andersonville National Cemetery. P. Sheppard, Andersonville, Georgia U.S.A. 13 (1973).

[59] R. Stevenson, *supra* note 28, at 88.

[60] Morsberger, *supra* note 1, at 37.

[61] *Id.* at 40.

[62] *Trial, supra* note 37, at 220.

[63] *Id.* at 222.

[64] *Id.* at 226.

[65] *Id.* at 227.

prisoner badly.[66] Only one witness could give the name of a prisoner Wirz allegedly killed, and the date of the alleged murder was in September. Since no specification agreed with that date, the commission changed a specification from June 13th to September to match the testimony.[67]

The star prosecution witness was a man named Felix de la Baume. De la Baume claimed to be a Frenchman and a grand nephew of Lafayette. He testified at great length about his captivity at Andersonville and the cruelties he personally saw Wirz inflict on prisoners, including shooting two men with his revolver. De la Baume was apparently quite an orator. He so impressed the commission with his testimony that he was given a written commendation for his "zealous testimony" signed by all of the commission members. He was also rewarded with a government clerk's job in the Department of the Interior. This all occurred before the trial of Wirz was completed! In his closing argument, Chipman stressed the compelling nature of De la Baume's testimony. Just eleven days after Wirz was hanged, De la Baume was spotted in Washington by veterans of the 7th New York Regiment as a deserter from their regiment whose real name was Felix Oeser. The veterans were so outraged that they went to the Secretary of the Interior and had Oeser fired. Upon his discovery, Oeser admitted his true identity and that he had committed perjury in the Wirz trial.[68]

It is not surprising that soldiers could be found who would commit perjury to testify in the Wirz trial. The trial was held in the United States Capitol Building[69] and was front page news every day. Prosecution witnesses were instant celebrities and could also hope for some other reward for their efforts. Defense witnesses, on the other hand, were vilified and intimidated and testified for Wirz at their own peril.

One of the most disturbing aspects of the trial was the role the judge advocate played regarding the defense witnesses. Procedurally, defense counsel were required to submit the names of the witnesses they desired to the judge advocate. The judge advocate would then issue subpoenas to procure the witness's attendance. Chipman required all witnesses to report to him first for questioning. After his interrogation, Chipman told a number of defense witnesses to leave, because their testimony would not be necessary or allowed. When the defense counsel complained to the commission that requested defense witnesses were being turned away, Chipman admitted that he considered it a matter within his discretion whether to subpoena a witness, and, if subpoenaed, whether to allow them to testify.[70] Incredibly, the commission upheld Chipman's actions without comment.

General John D. Imboden wrote in the *Southern Historical Society Papers* in 1876 that he had inspected Andersonville prison in 1865 and found Captain Wirz doing everything he could for the prisoners, including building log barracks, a tannery, and a shoe shop. He wrote, "I would have proved these facts if I had been permitted to testify on his trial, after I was summoned before the court by the United States."[71] Major General Howell Cobb was subpoenaed as a witness but received a subsequent telegram from Chipman instructing him not to come.[72] Confederate Commissioner of Exchange Robert Ould was also subpoenaed. When he reported to Chipman, he was told to surrender his subpoena. He refused, stating that the subpoena was his protection in Washington. Chipman took the subpoena from him and wrote on it, "the within subpoena is hereby revoked; the person named is discharged from further attendance."[73] One Union soldier who had been a prisoner at Andersonville and wanted to testify to Wirz's kind treatment of the prisoners was notified by defense that he would be called as a witness, but he was never subpoenaed to appear. That soldier was James M. Page of Illinois, who said that he was "sorely disappointed"[74] that he did not have the opportunity to tell the truth about Major Wirz. He later wrote a book entitled *The True Story of Andersonville* in which he termed the trial of Wirz, "the greatest judicial farce enacted since Oliver Cromwell instituted the commission to try and condemn Charles I."[75]

At least one subpoenaed defense witness was arrested and jailed after he showed up to testify. When a former prisoner named Duncan arrived to testify in Wirz's behalf, a government witness told Chipman that Duncan had mistreated prisoners while serving as a parolee working in the stockade kitchen. On that basis the man was arrested, charged, and put in prison. Defense counsel's protests and request to have the witness testify were to no avail.[76]

One defense strategy for responding to the charge of conspiracy to destroy prisoners' lives was to prove that Wirz and the Confederate government did everything possible to exchange prisoners with the North. In 1863, Secretary of War Stanton decided to end prisoner exchanges on the grounds that the South had more to gain from them than the North. No amount of Confederate entreaties could persuade Stanton to change his mind, even though the Confederacy explained its increasing inability to care for its prisoners. In July 1864, Wirz allowed a committee of four Andersonville prisoners to visit Washington on parole to explain the hardships at Andersonville and plead for an exchange. The men saw Stanton, were unsuccessful, and

---

[66] P. Sheppard, Andersonville, Georgia U.S.A. 20 (1973).

[67] Morsberger, *supra* note 1, at 37.

[68] S. Ashe, *supra* note 14, at 40.

[69] *Trial, supra* note 37, at 307.

[70] *Id.* at 615.

[71] J. Williamson, Prison Life in the Old Capitol 134 (1911).

[72] M. Rutherford, *supra* note 5, at 17.

[73] R. Stevenson, *supra* note 28, at 49.

[74] J. Page, The True Story of Andersonville 207 (1908).

[75] *Id.* at 216.

[76] S. Ashe, *supra* note 14, at 40.

honored their paroles by returning to Andersonville.[77] Virtually all accounts of prison life by Union soldiers written after the war condemn Stanton for his refusal to allow prisoner exchanges. Several writers have suggested that Stanton was anxious to have Wirz tried for war crimes to deflect the storm of criticism his policy received from returning veterans.[78]

When it became clear that the North would not exchange prisoners, the South offered to release its most seriously ill captives without exchange if the North would only send transports to the Georgia coast to receive them. In November, 1864, the South released thirteen thousand prisoners to the United States at the mouth of the Savannah River with no prisoners received in exchange. The majority of the released men came from Andersonville.[79] In February 1865, Wirz sent three thousand prisoners, virtually all of whom were well enough to make the trip, to Jacksonville, Florida, to be released to the Federal commander there. Upon their arrival, the Union commander, General E. P. Scammon, refused to accept them, and they had to return to Andersonville.[80]

Despite the obviously exculpatory nature of such evidence, the commission refused to allow any evidence from defense on the subject of exchange or release of prisoners on the ground that it was irrelevant.

Confederate Commissioner Ould was prepared to testify that the Confederacy tried to purchase medicine from the United States government and offered to pay United States currency, gold, tobacco, or cotton. The Confederacy even promised to use the medicine solely to treat Union prisoners, but the North refused.[81] This evidence, too, was deemed irrelevant.

The defense was prepared to prove that conditions at Andersonville, bad as they were, were similar to conditions at most prisoner of war camps. The United States War Department's own statistics showed that more Southern soldiers died in Northern prisons, 26,436, than did Northern soldiers in Southern prisons, 22,576. This was true even though the South held approximately fifty thousand more prisoners, making the death rate in Northern prisons about twelve per cent, while the rate in Southern prisons was less than nine per cent.[82] Again, the evidence was kept out as irrelevant. The commission did, however, allow the defense to prove that the Confederate guards at Andersonville received the same quality and quantity of rations as the prisoners, and that the death rate of the guards was approximately the same as the prisoners.[83]

Despite the adversity the defense faced, 68 of the 106 witnesses requested did appear and testify for Wirz.[84] The defense testimony described Wirz as a kind-hearted man, anguished by the terrible conditions in the prison, who did all that he could to alleviate the prisoners' suffering. What follows is a representative sampling. George Fletcher testified that Wirz was very helpful in ridding the prison of the "Raiders." Wirz allowed the law-abiding prisoners to hold courts-martial for the gang members, and he provided an armed guard. Six "Raiders" were hanged and many others received lesser punishments.[85] Frederick Guscetti testified that, when Wirz caught him trying to escape, he took him to the hospital to be clothed and fed and did not punish him.[86] Augustus Moesner testified that he worked as a parolee clerk in Wirz's office. Wirz treated him well and ensured that the prisoners always received their mail and care packages from home.[87] Mary Dawson testified that she visited a prisoner at Andersonville on a number of occasions. Wirz was always very kind to her and always allowed her to take whatever provisions she wanted to the prisoner.[88] Reverend Peter Whelan testified that he was a Catholic priest who worked with the prisoners daily from June to October 1864. Wirz was always most helpful. He seemed to be genuinely interested in the prisoners' welfare. Reverend Whelan never heard of any murder or cruelty by Wirz; if it had occurred he said he would have heard about it because he was among the prisoners every day.[89]

Notwithstanding the defense testimony, the verdict announced on October 24th came as no surprise. Wirz was found guilty of both charges and sentenced to be hanged.[90] The post trial review was conducted by the same Judge Advocate General Holt who headed the Bureau of Military Justice that had gathered evidence against Wirz. Holt's objectivity can be seen in the language of his review. He wrote that Wirz was a "demon"[91] whose work of death caused him "savage orgies"[92] of enjoyment. He closed by saying that Wirz represented the spirit of the rebellion in all his "murderous cruelty and baseness."[93] "It is by looking upon

---

[77] M. Rutherford, *supra* note 5, at 26.

[78] *E.g.*, S. Ashe, *supra* note 14. *See also* Davis, *supra* note 18. *See also* A. Stearns, *supra* note 25, at 77.

[79] Davis, *supra* note 18, at 342.

[80] O. Futch, *supra* note 3, at 115.

[81] J. Jones, *supra* note 13, at 129.

[82] *Id.* at 150.

[83] N. Chipman, *supra* at 202.

[84] *Id.* at 386.

[85] *Trial, supra* note 37, at 557.

[86] *Id.* at 517.

[87] *Id.* at 537.

[88] *Id.* at 607.

[89] *Id.* at 429.

[90] *Id.* at 808.

[91] *Id.* at 813.

[92] *Id.* at 813.

[93] *Id.* at 814.

. . . Andersonville . . . that we can best understand the inner and real life of the rebellion, and the hellish criminality and brutality of the traitors who maintained it.[94]

A Pardon Scorned

Two nights before he was hanged, three men visited Wirz in his cell at the Capitol Prison. The men told Wirz that they were agents of a powerful member of Congress, and that if he would be willing to testify that Jefferson Davis was responsible for the deaths of the prisoners at Andersonville, Wirz would be pardoned and set free. When Wirz indignantly refused their offer to purchase his liberty with perjury, the same men communicated the offer to both Wirz's defense attorney, Mister Lewis Schade, and Wirz's attending priest, Reverend F. E. Boyle.[95]

Conclusion

On November 10, 1865, the sentence was carried out.[96] The request of Wirz's family for his body was denied, and he was buried in the prison yard beside the Lincoln conspirators.[97] Convinced of his client's innocence, Louis Schade wrote an "open letter to the American public" on April 4, 1867, in which he attempted to explain how Wirz had been unfairly convicted.[98]

In the years after the war, many books and articles were written about Andersonville and the trial of Wirz. In 1908, the United Daughters of the Confederacy erected a monument to Wirz in the town of Andersonville, where a memorial service for Wirz is still held annually.[99] In 1977, the Sons of Confederate Veterans named Wirz the "martyr of the Confederacy" at their national convention, and in 1981 that same organization awarded Wirz their Confederate Medal of Honor.[100]

That Wirz was a scapegoat, tried in order to incriminate the Confederate leaders and to deflect criticism from Secretary of War Stanton, seems obvious. That Wirz was unjustly convicted is also clear to the student of Andersonville and the Wirz trial. As one author aptly wrote, "the nature of the food, the number of the inmates, and the lack of comforts were as totally beyond his control as was the heat of the southern sun."[101]

In the state archives in Richmond, Virginia, there is a letter written by an ex-Andersonville prisoner in 1919 which states, "I have alienated the friendship of many old comrades and friends by telling the truth as I saw it about Major Wirtz [sic] and his innocence, but I am content and still firm in my belief that history will correct itself, prejudice illuminated, and the truth recognized."[102] I hope that this article will, in some small way, help the truth to be recognized. The trial of Henry Wirz was worse than a mistake, worse even than a miscarriage of justice. The trial of Major Henry Wirz was a national disgrace.

[94] *Id.* at 814.

[95] Williamson, *supra* note 70, at 145.

[96] Morsberger, *supra* note 2, at 30.

[97] S. Ashe, *supra* note 14, at 20.

[98] M. Rutherford, *supra* note 5, at 28.

[99] *Id.* at 51.

[100] *Id.* at 60.

[101] S. Ashe, *supra* note 14, at 29.

[102] Letter from James M. Page to Lyon G. Tyler (Feb. 19, 1919) (discussing Wirz trial).

Category II Differing Site Conditions in Construction Contracts

*Captain William R. Medsger**
AMC Contract Law Intern, U.S. Army Missile Command, Redstone Arsenal, Alabama

Introduction

Despite the exercise of due diligence, construction contractors frequently encounter unanticipated physical conditions at their work sites. These may range from subsurface rock which is difficult to remove, to soil that will not compact sufficiently to support a building's foundation.

At common law, a contractor is not excused from performing nor is it entitled to additional compensation for overcoming these unforeseen difficulties.[1] Because the contractor bears this risk, usually its bid will include a contingency factor to compensate it in the event that he encounters an unexpected condition.

In federal procurements, however, the government shifts the risk for unanticipated conditions from the contractor to

*This article was originally prepared in satisfaction of the Advanced Acquisitions elective of the 35th Judge Advocate Officer Graduate Course.

[1] United States v. Spearin, 248 U.S. 132, 136 (1918).

the government. The differing site conditions clause[2] provides that either party shall be entitled to an equitable adjustment if the contractor encounters (1) subsurface or latent physical conditions that differ materially from those indicated in the contract or (2) unknown and unusual physical conditions that differ materially from those ordinarily encountered, causing an increase or decrease in the cost or time required to perform the contract. These latter conditions are known as category II differing site conditions and are the subject of this article.[3]

The contracting officer must insert the differing site conditions clause in all fixed-price construction, dismantling, demolition, or removal of improvements contracts, provided the contract is expected to exceed $25,000.[4] The insertion of the clause should ultimately benefit the government by eliminating the need for contractors to pad their bids to cover the possibility of encountering an unforeseen site condition. Although the clause is advantageous to the contractor, the clause will not protect it from the consequences of its own foreseeable miscalculations.[5] Also, the "either party" language in the clause is a two-edged sword—it may result in a downward as well as an upward equitable adjustment.

The purpose of this article is to analyze what circumstances qualify as category II differing site conditions and what proof is required to entitle a party to an equitable adjustment. The article focuses on appeals decided by the Armed Services Board of Contract Appeals (ASBCA), because most military attorneys will be required to resolve such claims within that disputes forum. This article will focus on contractors seeking upward adjustments, rather than the government seeking downward adjustments, as the former is the more common situation confronting the government contract attorney.

Proof Requirements

In category II differing site conditions cases, the government has elected not to survey the site or represent in the contract the site conditions, as it does in category I cases. Therefore, in category II cases the contractor bears the burden of proving the existence of an unknown and unusual differing site condition.

To prevail before the ASBCA, the contractor must prove:

(1) What were the recognized and usual conditions at the work site?

(2) What physical conditions were actually encountered?

(3) Did they differ materially from the known and the usual?

(4) If so, did they cause an increase in the cost of performance?[6]

The burden of proving a category II condition is more onerous than that for a category I condition.[7] Because the contract is silent as to the existence of the condition, the contractor may not merely assert that the condition is different than as stated in the contract. Instead, it must prove that the condition was both unknown and unusual. The attorney should realize that the burden is more stringent only in the sense that the contractor must present evidence proving each element instead of merely making assertions. The decisional standard for both categories of cases is the preponderence of the evidence standard.[8]

Condition Must Have Been Unknown

To qualify as a differing site condition, the existence of the condition must have been unknown to the contractor when he submitted his bid.[9] It must be one that reasonably could not have been anticipated by the contractor from a

---

[2] Federal Acquisition Reg. 52.236–2 (1 Apr. 1984) [hereinafter FAR]:

Differing Site Conditions (April 1984)

(a) The Contractor shall promptly, and before the conditions are disturbed, give a written notice to the Contracting Officer of (1) subsurface or latent physical conditions at the site which differ materially from those indicated in this contract, or (2) unknown physical conditions at the site, of an unusual nature, which differ materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the contract.

(b) The Contracting Officer shall investigate the site promptly after receiving the notice. If the conditions do materially so differ and cause an increase or decrease in the Contractor's cost of, or the time required for, performing any part of the work under this contract, whether or not changed as a result of the conditions, an equitable adjustment shall be made under this clause and the contract modified in writing accordingly.

(c) No request by the Contractor for an equitable adjustment to the contract under this clause shall be allowed, unless the Contractor has given the written notice required; provided, that the time prescribed in (a) above for giving written notice may be extended by the Contracting Officer.

(d) No request by the Contractor for an equitable adjustment to the contract for differing site conditions shall be allowed if made after final payment under this contract.

The clause was renamed in 1967 from "Changed Conditions" to "Differing Site Conditions." The wording of the two clauses is substantially identical. The reason for the change was "the elimination of ambiguities and inconsistences." 32 Fed. Reg. 16,268 (1967). *See generally* Ellison, *Changed Conditions: An Analysis Based on Recent Court and Board Decisions*, 30 Fed. B.J. 13 (1971).

[3] The former conditions are known as category I differing site conditions.

[4] FAR 36.502. Insertion of the clause in contracts under $25,000 is discretionary.

[5] James E. McFadden, ASBCA No. 11931, 76–2 BCA ¶ 11,183, *aff'd on reconsideration*, 79–2 BCA ¶ 13,928.

[6] Robert McMullan & Son, Inc., ASBCA No. 22168, 78–2 BCA ¶ 13,228 (citing Charles T. Parker Constr. Co. v. United States, 433 F.2d 771 (Ct. Cl. 1970)); *see also* Potomac Co., Inc., ASBCA No. 25371, 81–1 BCA ¶ 14,950; A.D. Roe Company, Inc., ASBCA No. 24311, 81–1 BCA ¶ 14,824.

[7] COVCO Hawaii Corp., ASBCA No. 27854, 84–2 BCA ¶ 17,474; Quiller Constr. Co., ASBCA No. 25980, 84–1 BCA ¶ 16,998; Sealite Corp., ASBCA No. 26209, 83–2 BCA ¶ 16,792; Hoyt Harris Inc., ASBCA No. 23543, 81–1 BCA ¶ 14,829; Robert McMullan & Son, Inc., ASBCA No. 22168, 78–2 BCA ¶ 13,228.

[8] B.D. Click Co., ASBCA No. 20616, 77–2 BCA ¶ 12,708.

[9] *See supra* note 2.

study of the contract documents,[10] a site investigation,[11] or the general experience of the contractor.[12] Thus, if the government alerted the contractor to a potential condition, or because of the contractor's past experience in the locale it should have realized the condition might exist, the contractor will be unable to prove that the condition was unknown.[13] The test is both objective and subjective—that the contractor knew or should have known of the existence of the condition.[14]

Contractors are held to objectively know only that which a similarly situated contractor would have known. They are not held to know what only an expert would have been able to ascertain.[15]

Normally, to prove that a condition was unknown, the contractor will testify that he conducted a reasonable site investigation and that the condition was not apparent from the investigation.

Site Investigation

The contractor must acknowledge in its bid that it has conducted a site investigation to ascertain the character, quality, and quantity of the surface and subsurface materials, and that it is satisfied with the site conditions.[16] This requirement, however, must be interpreted in light of the differing site conditions clause. If the government could deny a contractor's claim merely because the contractor had stated that he was satisfied with the site's conditions, the differing site conditions clause would be rendered meaningless. Accordingly, the ASBCA has reconciled this dilemma by holding that only those conditions that were ascertainable by a reasonable site investigation are waived by the contractor's site investigation acknowledgement.[17]

Most of the litigation concerning the duty to investigate focuses on the thoroughness of the investigation. The ASBCA has stated that the sufficiency of the site investigation is measured by what a reasonably experienced, intelligent contractor should have discovered or anticipated.[18]

At the very least, a visual inspection of the site is necessary.[19] Even the contractor's past experience in the site's locale will not be an acceptable substitute for a visual inspection.[20] And if the contractor is on notice that a condition may exist, it may be required to conduct more than a visual inspection.[21] This notice may be predicated on information in the contract documents, oral assertions by government employees, or the past experiences of the contractor. Even when the contractor is on notice that a

---

[10] *See* B&M Roofing and Painting Co., ASBCA No. 26998, 86-2 BCA ¶ 18,833 (government orally informed contractor that he might encounter several layers of roofing instead of only one layer); C.& L. Constr. Co., ASBCA No. 22993, 81-1 BCA ¶ 14,943, *aff'd on reconsideration*, 81-2 BCA ¶ 15,373 (government boring samples should have alerted contractor that loosely compacted soil might be encountered); Callaway Landscape, Inc., ASBCA No. 22546, 79-2 BCA ¶ 13,971 (government told contractor to examine utility plans; thus, contractor should have realized that utilities might be in ground under site).

[11] *See* White Cap Painters, ASBCA No. 25364, 81-2 BCA ¶ 15,195 (site investigation revealed some paint was peeling; therefore, contractor should have anticipated same problem); Titan Midwest Constr. Corp., ASBCA No. 23594, 81-1 BCA ¶ 15,067 (contractor should have known of possible subsurface water because site was near a pond, creek, and drainage ditch); Lunseth Plumbing and Heating Co., ASBCA No. 25332, 81-1 BCA ¶ 15,063 (unusual height of tub faucets could have been determined by a visual inspection).

[12] Potomac Co., ASBCA No. 25371, 81-1 BCA ¶ 14,950; *see also* Hoyer Constr. Co., ASBCA No. 21616, 84-2 BCA ¶ 17,249 (contractor possessed extensive prior experience at the general location of the site).

[13] *See supra* notes 10-12.

[14] Ellis Constr. Co., ASBCA No. 19541, 75-1 BCA ¶ 11,238; *see also* Acme Missiles & Constr. Corp., ASBCA No. 10784, 66-1 BCA ¶ 5418 (contractor should have known that hookworms were prevalent in Florida).

[15] Blake Constr. Co., and U.S. Industries, A Joint Venture, ASBCA No. 20747, 83-1 BCA ¶ 16,410; *see also* Hamilton Constr. Co., ASBCA No. 21314, 79-2 BCA ¶ 14,095, *aff'd on reconsideration*, 80-2 BCA ¶ 14,750 (electrical engineer might have been on notice of condition, but not a general contractor).

[16] FAR 52.236-3:

Site Investigation and Conditions Affecting the Work (April 1984)

(a) The Contractor acknowledges that it has taken steps reasonably necessary to ascertain the nature and location of the work, and that it has investigated and satisfied itself as to the general and local conditions which can affect the work or its cost, including but not limited to (1) conditions bearing upon transportation, disposal, handling, and storage of materials; (2) the availability of labor, water, electric power, and roads; (3) uncertainties of weather, river stages, tides, or similar physical conditions at the site; (4) the conformation and the conditions of the ground; and (5) the character of equipment and facilities needed preliminary to and during work performance. The Contractor also acknowledges that it has satisfied itself as to the character, quality, and quantity of the surface and subsurface materials or obstacles to be encountered insofar as this information is reasonably ascertainable from an inspection of the site, including all exploratory work done by the Government, as well as from the drawings and specifications made a part of this contract. Any failure of the Contractor to take the actions described and acknowledged in this paragraph will not relieve the Contractor from responsibility for estimating properly the difficulty and cost of successfully performing the work, or for proceeding to successfully perform the work without additional expense to the Government.

This clause must be inserted in the same contracts as the Differing Site Conditions clause. FAR 36.503.

[17] C.& L. Constr. Co., ASBCA No. 22993, 81-1 BCA ¶ 14,943, *aff'd on reconsideration*, 81-2 BCA ¶ 15,373.

[18] Northwest Painting Service, Inc., ASBCA No. 27854, 84-2 BCA ¶ 17,474; *see also* COVCO Hawaii Corp., ASBCA No. 26901, 83-2 BCA¶ 16,554 (lava bed could have been reasonably anticipated or discovered during site investigation).

[19] *See* Sealite Corp., ASBCA No. 26209, 83-2 BCA ¶ 16,792 (had the contractor inspected the ceiling, it would have observed that ceiling would not support the installation of insulation); Lunseth Plumbing and Heating Co., ASBCA No. 25332, 81-1 BCA ¶ 15,063 (visual inspection would have revealed nonstandard tub faucet heights); Hoyt Harris Inc., ASBCA No. 23543, 81-1 BCA ¶ 14,829 (contractor failed to inspect visually the site that included an unexpected marsh); Schnip Building Co., ASBCA No. 21637, 78-2 BCA ¶ 13,310, *aff'd sub non.* Schnip Building Co. v. United States, 645 F.2d 950 (Ct. Cl. 1981) (visual inspection would have revealed rock outcroppings).

[20] Overhead Electric Co., ASBCA No. 22210, 78-2 BCA ¶ 13,440 (contractor's past experience did not substitute for visual inspection that would have revealed rock outcropping).

[21] *See* Hensel Phelps Constr. Co., ASBCA No. 27138, 83-1 BCA ¶ 16,365 (because visual inspection revealed no overhead power lines in housing area, contractor should have realized that lines were underground and should have attempted to locate them).

condition may exist, however, it normally will not be required to retain experts to investigate the site and evaluate the condition.[22]

Some generalities can be gleaned from the board's decisions concerning the necessary degree of site investigation. Probably the most common dispute involves the discovery of subsurface rock when the contractor starts excavating the site. Because of the increased expense to remove the rock, a claim for an equitable adjustment is certain to follow. If visible rock outcroppings[23] covered the site, the board will find that the contractor was on notice that subsurface rock might be encountered.[24] On the other hand, if the outcroppings were hidden by heavy vegetation or foliage, the contractor's failure to discover the outcroppings during the inspection may be excused.[25]

Another common dispute involves conditions discovered by roofing contractors. Normally, these disputes arise when the contractor dismantles the old roof and encounters a problem that was not visible when the roof was intact. The ASBCA does not require contractors, as part of the site investigation, to remove sample shingles to be analyzed,[26] to remove shingles to determine the condition of the roofing structure below,[27] to poke holes up through the ceiling or dig holes in the built-up roof to discover the subsurface conditions,[28] to discover defects in the structural support system below the roof,[29] or to dismantle part of the roof to determine the adhesive that was used to attach the roof.[30] It appears that the board focuses more on whether the work necessary to overcome the condition should be considered inherent in performing the roofing contract, rather on the thoroughness of the site investigation. This may be based on the practical consideration that the government does not want every prospective bidder climbing on the roof and tearing it apart during the site investigation. One can imagine the problems that would arise if bidders were required to conduct such a thorough investigation.

A third issue is the contractor's need to examine soil borings[31] extracted from the site. The contractor must examine any soil borings provided by the government, but normally need not make its own subsurface exploration.[32] To require otherwise would probably be financially prohibitive for most bidders.

Although the above examples provide some helpful guiding principles, disputes decided by the ASBCA are governed more by a reasonable interpretation of the evidence presented than by any per se rules. This is best illustrated by examining three appeals in which contractors were seeking additional expenses incurred for removing mortar that was harder then they had anticipated. In *George E. Jenson Contractor, Inc.*,[33] the contractor was installing new doors in barracks at Fort Rucker when he encountered abnormally hard mortar that he had to remove. The board allowed the claim, finding that it was impossible to determine the hardness of mortar by a visual inspection, and it was not normal for a bidder to extract a sample of the mortar to test it for hardness as part of a site investigation.[34]

Eight years later, the board decided another mortar case.[35] In this case, the contractor encountered unusually hard mortar while renovating buildings at West Point. The board denied the claim, finding that reasonable, prudent bidders follow the practice of not only visually inspecting, but also of cutting out mortar samples to estimate the difficulty to be encountered later during the performance of the contract.[36] These two cases can be distinguished only by the fact that in the latter appeal, evidence was presented that it was well known by masons that mortar at West Point is especially hard, and that it is a custom of the trade

---

[22] Joseph A. Cairone, Inc., ASBCA 20504, 81-2 BCA ¶ 15,220; *see also* Hamilton Constr. Co., ASBCA No. 21314, 79-2 BCA ¶ 14,095, *aff'd on reconsideration*, 80-2 BCA ¶ 14,750 (although electrical engineer might have realized that electrical conduits might be buried in ground that was to be excavated, general contractor would not have known that); *cf.* C.& L. Constr. Co., ASBCA No. 22993, 81-1 BCA ¶ 14,943, *aff'd on reconsideration* 81-2 BCA ¶ 15,373 (contractor not charged with notice of unusual soil conditions that even a soil testing lab was unable to detect).

[23] A rock outcropping is that part of a rock formation that protrudes from the surface, indicating that a large rock formation may lie beneath the surface.

[24] *See* COVCO Hawaii Corp., ASBCA No. 26901, 83-2 BCA ¶ 16,554 (because outcroppings were visible, contractor should have known that he might encounter solid lava); Overhead Electric Co., ASBCA No. 22210, 78-2 BCA ¶ 13,440 (outcroppings were visible over area contractor was to bury its electric lines).

[25] Robert D. Carpenter, Inc., ASBCA No. 22297, 79-1 BCA ¶ 13,675. Of course, if the contractor had other notice of the condition, it might not be entitled to an equitable adjustment. *See supra* text accompanying note 21.

[26] *See* B&M Roofing and Painting Co., ASBCA No. 26998, 86-2 BCA ¶ 18,833 (shingles had been penetrated by a gummy substance that increased the difficulty of removing the roof; substance was not visible when shingles were attached to the roof).

[27] *See* A.D. Roe Co., ASBCA No. 24311, 81-1 BCA ¶ 14,824 (contractor could not have known of the structure's deteriorating condition unless it had removed shingles).

[28] *See* Fermino O. Gonzalez, ASBCA No. 21421, 80-1 BCA ¶ 14,254 (water pockets on roof could not have been discovered without poking roof).

[29] *See* Leonard Blinderman Constr. Co., Inc., ASBCA No. 18946, 75-1 BCA ¶ 11,018 (latent depressions in structural support system caused excess water ponding on roof).

[30] *See* Southern Roofing & Petroleum Co., ASBCA No. 12841, 69-1 BCA ¶ 7599 (contractor not required to remove part of roof to discover that roof was fastened with unusual asphalt). *But see* TGC Contracting Corp., ASBCA No. 24441, 83-2 BCA ¶ 16,764, *aff'd sub nom.* TGC Contracting Corp. v. United States, 736 F.2d 1512 (Fed. Cir. 1984) (contractor should have anticipated that roof would be a coal tar pitch roof, because coal tar pitch roofs are commonplace in New Cumberland, PA).

[31] A soil boring is a vertical sample of the soil displaying the soil's consistency.

[32] *See* Hurlen Constr. Co., ASBCA No. 31069, 86-1 BCA ¶ 18,690; W. S. Meadows Engineering, Inc., ASBCA No. 21938, 78-1 BCA ¶ 12,863.

[33] George E. Jenson Contractor, Inc., ASBCA No. 20234, 76-1 BCA ¶ 11,741.

[34] *Id.*

[35] Eris Painting and General Corp., ASBCA No. 27803, 84-1 BCA ¶ 17,148.

[36] *Id.*

to cut samples before bidding.[37] No such evidence was presented in the *Jenson* case. Therefore, it is obvious that the evidence presented to the board is the decisive factor in most appeals.

Contractor's Failure to Investigate

If the contractor fails to conduct a physical site investigation, it assumes the risk only with respect to those differing site conditions that would have been apparent from a reasonable investigation.[38] If a reasonable investigation would not have revealed the condition then the failure to investigate will not bar the contractor's recovery.[39] The contractor bears the burden of proving that a reasonable investigation would not have revealed the condition.[40]

Nevertheless, the board has indicated that if the failure to investigate is attributed to the government's action or inaction, then the requirement to investigate is totally excused.[41] In *Raymond International,*[42] the government allowed only two months for bid preparation. The ASBCA found this to be an insufficient amount of time for the contractor to survey 311.55 kilometers of road in Thailand and prepare a bid.[43] In another appeal,[44] the contractor had twice attempted to investigate, but the government denied it access to the site each time. The board therefore excused the contractor's failure to investigate the site.

Mere difficulty of investigating, however, will not excuse the failure to investigate. In *R.M. Duval Construction Co.,*[45] the contractor sought to excuse its failure to investigate because the terrain was extremely rough, densely wooded, covered with brush, and infested with snakes. The board denied the claim because although the investigation may have been difficult, it was not impossible.[46] Thus it appears that whenever a contractor fails to conduct an investigation that would have revealed the condition, the board will require the contractor to prove that it was in fact impossible to investigate.

Government's Failure to Disclose Information

The most difficult cases to resolve arise when the government has knowledge of a condition, but fails to disclose this information to the bidders. The ASBCA has held that when the government does not provide any information in the contract about the site conditions, the contractor should conduct a more detailed site investigation.[47] This higher investigation requirement, however, may be offset by the government's failure to disclose information regarding the existence of an unusual condition.[48]

On occasion, the board has sustained claims because the contracting officer failed to disclose a latent condition of which the government was aware.[49] In all of these cases, however, the contractor had conducted a reasonable site investigation that did not reveal the condition. Thus, the full extent of this doctrine of superior knowledge is unknown.

Recently, the board's analysis of the government's duty to disclose information has shifted somewhat. In *James E. McFadden,*[50] the contractor requested an economic adjustment because it encountered subsurface water. The government was aware that previous contractors had experienced the same problem at the site, but the government failed to disclose this information to McFadden. The ASBCA denied the claim, stating that it knew of no rule that required the government to include in the solicitation a summary of all claims on similar projects in the same geographic area.

Five years later, another appeal[51] was filed by a contractor who was performing work on the same site as McFadden. The contractor experienced the same subsurface water problems as McFadden and alleged that the government should have disclosed these problems in the solicitation. This time, the board sustained the claim, stating that the government reasonably and in good conscience should have disclosed the problems encountered by McFadden. The board attempted to distinguish *McFadden* by stating that there was nothing that the bidders could have done to learn of McFadden's problems other than

---

[37] *Id.; see also* Brooks & Rivellini, Inc., ASBCA No. 25876, 84–1 BCA ¶ 17,102 (board denied contractor's claim, finding that even though contractor had taken mortar samples of the rear walls of each building, he should have taken mortar from all of the walls).

[38] AAAA Enterprises, Inc., ASBCA No. 28172, 86–1 BCA ¶ 18,628.

[39] Praxis-Assurance Venture, ASBCA No. 24748, 81–1 BCA ¶ 15,028; Alps Constr. Corp., ASBCA No. 16966, 73–2 BCA ¶ 10,309; *see also* Lyburn Constr. Co., ASBCA No. 29581, 85–1 BCA ¶ 17,764 (contractor failed to inspect; a reasonable inspection would have revealed unusually thick, dry paint that would have to be removed); Sealite Corp., ASBCA No. 26209, 83–2 BCA ¶ 16,792 (had contractor inspected the ceiling, it would have discovered that it would not support the installation of insulation); Leiden Corp., ASBCA No. 26136, 83–2 BCA ¶ 16,612 (lack of evidence in the record whether the contractor had conducted a site investigation did not bar its claim).

[40] Tutor-Saliba, ASBCA No. 23766, 79–2 BCA ¶ 14,137.

[41] *See* Raymond International of Delaware, Inc., ASBCA No. 13121, 70–1 BCA ¶ 8341.

[42] *Id.*

[43] *Id.*

[44] Pavement Specialists, Inc., ASBCA No. 17410, 73–2 BCA ¶ 10,082.

[45] ASBCA No. 8629, 1963 BCA ¶ 3722, *aff'd on reconsideration,* 1963 BCA ¶ 3790.

[46] *Id.*

[47] Commercial Mechnical Contractor's Inc., ASBCA No. 25695, 83–2 BCA ¶ 16,768. The rationale is that by not being provided any information, the contractor must gather its own information to ascertain the site conditions.

[48] *Id.* (government knew site was in a flood plain and did not inform contractor); *see also* Leonard Blinderman Constr. Co., ASBCA No. 18946, 75–1 BCA ¶ 11,018 (visual inspection did not reveal depression in structural support system and government did not disclose it); Edgar M. Williams, General Contractor, ASBCA No. 16058, 72–2 BCA ¶ 9734 (double roofs are considered unusual, although they are common to Fort Polk, and government knew that).

[49] *See Blinderman; Williams.*

[50] ASBCA No. 19931, 76–2 BCA ¶ 11,983, *aff'd on reconsideration,* 79–2 BCA ¶ 13,928.

[51] Joseph A. Cairone, Inc., ASBCA No. 20504, 81–2 BCA ¶ 15,220.

through government disclosure, and that the problems encountered were highly relevant to this contractor's claim. The board's attempt to distinguish the cases is unpersuasive, however, because the supposedly distinguishing factors were present also in *McFadden*.

Later, in another subsurface water appeal,[52] the ASBCA again found that the government should have disclosed problems that other contractors had previously encountered on the site. Therefore, the government attorney is well advised to ensure that any relevant, recent problems encountered by prior contractors on or near the work site are revealed in the solicitation.

Regardless of the government's failure to disclose, a contractor that is claiming relief on the basis of nondisclosure must show that it, in fact, was misled as to the true conditions at the site because of the nondisclosure.[53] If the contractor should have anticipated the existence of the condition absent the nondisclosure, then it has not been misled.[54]

Physical Condition

The differing condition must be a physical condition at the work site.[55] The ASBCA has held that conditions precipitated by political events are not physical conditions within the meaning of the differing site conditions clause.[56] In *Keang Nam Enterprises, Ltd.*,[57] the ASBCA denied a contractor's claim for expenses incurred when it had to evacuate its work site due to the physical dangers posed by the commencement of hostilities during the Tet Offensive of 1968.

Besides being physical, the condition must also be static, and not one that merely amounts to a physical interference at the work site.[58] Acts of God, such as abnormal rainfall,[59] rough seas,[60] strong winds,[61] hurricanes[62] and severe temperatures[63] by themselves do not constitute differing site conditions, even though they may frustrate contract performance. Recovery may be allowed, however, when additional costs are incurred because of the interaction of an Act of God and an unknown and unusual physical condition on the work site.[64] A heavy rain that causes flooding because of an unknown and an unusual drainage system on the site is such an interaction.[65]

The physical condition need not be a condition present only in nature, but may be an artificial or man-made condition such as electric lines,[66] sewer lines[67] or gas pipes[68] that are unexpectedly encountered during excavation.

Although a literal reading of the differing site conditions clause does not restrict recovery only to conditions that existed at the time the contract was formed, the ASBCA has interpreted such a restriction.[69] On one occasion, however, the board did allow a differing site conditions claim for damage caused by a condition that did not exist at the time the contract was formed.[70] Sand that had been deposited uphill from the site by another contractor washed down during a heavy rain. The board reasoned that the government had a duty to control and prevent such conditions caused by other contractors. The basis for sustaining the claim probably should not have been the differing site conditions clause, however, but rather should have been solely a breach of the government's implied duty to cooperate and not hinder contract performance, which is unrelated to the differing site conditions clause.

---

[52] Commercial Mechnical Contractor's Inc., ASBCA No. 25695, 83–2 BCA ¶ 16,768 (site was over Cache Creek flood plain).

[53] Joseph A. Cairone, Inc., 81–2 BCA ¶ 15,220; James E. McFadden, ASBCA No. 19931, 76–2 BCA ¶ 11,983, *aff'd on reconsideration*, 79–2 BCA ¶ 13,928.

[54] *See* AAAA Enterprises, Inc., ASBCA No. 28172, 86–1 BCA ¶ 18,628 (undisclosed oil condition was foreseeable because work site was near a diesel tank farm); Ramstad Constr. Co., ASBCA No. 20996, 77–2 BCA ¶ 12,620 (contractor should have known that the rim on the jet fuel tank might have been soaked in JP4 fuel absent government's nondisclosure); P.A. Rivera & Sons, Inc., ASBCA No. 15724, 72–1 BCA ¶ 9469 (site investigation would have revealed silty soil).

[55] *See supra* note 2.

[56] Keang Nam Enterprises, Ltd., ASBCA No. 13747, 69–1 BCA ¶ 7705.

[57] *Id.* (the contractor was rehabilitating a surgical hospital in the Republic of Vietnam).

[58] Ames & Denning, Inc., ASBCA No. 6956, 1962 BCA ¶ 3406; *see also* Yarno and Associates, ASBCA No. 10257, 67–1 BCA ¶ 6312.

[59] Maintenance Engineers, ASBCA No. 23131, 81–2 BCA ¶ 15,168, *modified on other grounds*, 83–1 BCA para. 16,411; Praxis-Assurance Venture, ASBCA No. 24748, 81–1 BCA ¶ 15,028; Reinhold Constr., Inc., ASBCA No. 23770, 79–2 BCA ¶ 14,123; Frank W. Miller Constr. Co., ASBCA No. 22347, 78–1 BCA ¶ 13,039; E.J.T. Constr. Co., ASBCA No. 17425, 73–2 BCA ¶ 10,050; George A. Fuller, Co., ASBCA No. 8524, 1962 BCA ¶ 3619.

[60] Hardeman-Monier-Hutcherson, A Joint Venture, ASBCA No. 12392, 68–2 BCA ¶ 7220, *rev'd on other grounds*, 458 F.2d 1364 (Ct. Cl. 1972).

[61] B.D. Click Co., ASBCA No. 20616, 77–2 BCA ¶ 12,708; B&W Constr. Corp., ASBCA No. 20502, 76–1 BCA ¶ 11,693.

[62] F.E. Booker Co., ASBCA No. 15767, 71–2 BCA ¶ 9025; E.W. Jackson Contracting Co., ASBCA No. 7267, 1962 BCA ¶ 3325.

[63] Overland Electric Co., ASBCA No. 9096, 1964 BCA ¶ 4359.

[64] *See* Frank W. Miller Constr. Co., ASBCA No. 22347, 78–1 BCA ¶ 13,039 (claim allowed for sand that washed down on work site during heavy rain); B.D. Click Co., ASBCA No. 20616, 77–2 BCA ¶ 12,708 (ASBCA stated that strong wind combined with unusual ventilation duct system might have qualified as a differing site condition had contractor presented evidence of duct system's unusual nature); Warren Painting, Co., ASBCA No. 18456, 74–2 BCA ¶ 10,834 (unusual pressure from incoming tides coupled with peculiar structural features of dock causing continuous seepage onto dock was found to be a differing site condition); F.D. Rich Co., ASBCA No. 6515, 1963 BCA ¶ 3710 (although not found in this case, the ASBCA stated that under some conditions interaction of soil and excessive precipitation might constitute a changed condition); Fred G. Koeneke and M.R. Latimer, Copartners, ASBCA No. 3163, 57–1 BCA ¶ 1313. *See generally* Crowell & Dees, *The Weather—Its Effect on Government Contracts*, Briefing Paper No. 65–4 (Fed. Pubs., Aug. 1965).

[65] *See* D.H. Dave and Gerben Contracting Co., ASBCA No. 62577, 1962 BCA ¶ 3493.

[66] Hamilton Constr. Co., ASBCA No. 21314, 79–2 BCA ¶ 14,095, *aff'd on reconsideration*, 80–2 BCA ¶ 14,750.

[67] UNITEC Inc., ASBCA No. 22025, 79–2 BCA ¶ 13,923.

[68] Glenn Heating, ASBCA No. 25754, 83–1 BCA ¶ 16,358.

[69] Randall H. Sharpe, ASBCA No. 22800, 79–1 BCA ¶ 13,869; *see also* Acme Missiles & Constr. Co., ASBCA No. 10784, 66–1 BCA ¶ 5418 (claim denied because hookworms infested the site after contract performance began).

[70] Frank W. Miller Constr. Co., ASBCA No. 22347, 78–1 BCA ¶ 13,039.

Unusual Conditions

The bulk of the litigation regarding differing site conditions concerns the requirement that the condition be "unusual." Illustrative of these disputes is *Community Power Suction Furnace Cleaning Company.*[71] The contractor in that appeal was awarded a contract to clean out heating ducts in barracks at Fort Bragg. Its efforts were impeded by extraneous matter that it found in the ducts. The debris included beer cans, jars of jam, gunpowder, live ammunition, and ladies underwear (described as being in a deplorable condition). Even a whiskey still was found in one of the furnace rooms. The trash in the ducts constantly entangled the contractor's vacuuming machines, resulting in delays and increased costs of performance. Even though the government argued that the condition of the heating ducts should not have been considered unusual for military barracks, the ASBCA perfunctorily found that the condition was most unusual.

Although most of the appeals are not as blatant and easy for the board to decide, there are some trends that seem to guide the board's decisions on this issue. The board generally allows claims when it finds the presence of at least one of the following factors: the condition is an anomaly to the site's geographic area;[72] the condition is an obstruction that is located in a strange and uncommon location;[73] the condition normally is not found in other similar structures;[74] although the contractor was aware of the condition, the magnitude of the condition's effect on the performance of the contract was more than would normally be expected;[75] or the condition is an unexplained phenomenon.[76]

On the other hand, the board will generally deny claims when one of the following factors is present: the condition is common to buildings or structures built during a particular era, even though the contractor was not accustomed to the existence of the condition;[77] the condition is subsurface water and the site is located near a large body of water;[78] the condition is an obstruction in a customary location;[79] the contractor has experienced the condition on similar projects;[80] or the condition is normal for the geographic area.[81]

Other than the factors listed above, the cases are decided strictly on the facts and on any expert testimony presented to the board on the issue of whether the condition was unusual. Accordingly, any further discussion of cases dealing with this issue would not be helpful.

Notice Requirement

Under the differing site conditions clause, whenever the contractor encounters a differing site condition, it must give written notice of the condition to the contracting officer before the condition is disturbed. The contractor is required to give notice only of the existence of the condition; it need not give notice that overcoming the condition will entail additional costs.[82] A claim for the additional costs may be presented at any time before final payment under the contract. Thus the astute contracting officer should investigate whenever notice is received, regardless of whether the contractor has indicated that a claim will be asserted.[83]

Although the clause requires written notice, the board routinely finds that oral notice is sufficient.[84] Thus, contract inspectors must be alert to such notice and immediately convey it to the contracting officer.

Even when no notice has been given, however, the ASBCA will excuse the failure to give notice unless the

---

[71] ASBCA No. 13803, 69-2 BCA ¶ 7963.

[72] *See* Hurlen Constr. Co., ASBCA No. 31069, 86-1 BCA ¶ 18,690 (loose cobbles are not normally found in waters off Bangor, WA); Leiden Corp., ASBCA No. 26136, 83-2 BCA ¶ 16,612 (subsurface solid rock was unusual to this area of New England); Robert D. Carpenter, Inc., ASBCA No. 22297, 79-1 BCA ¶ 13,675 (encountering a 5-11 inch concrete road slab was unexpected at this Air Force base).

[73] *See* UNITEC Inc., ASBCA No. 22025, 79-2 BCA ¶ 13,923 (sewer pipes on runway are normally not expected).

[74] *See* Quiller Constr. Co., ASBCA No. 25980, 84-1 BCA ¶ 16,998 (unusually thick plaster and tiles affixed to walls in unusual manner); Warren Painting, Co., ASBCA No. 18456, 74-2 BCA ¶ 10,834 (peculiar structural features of dock caused continuous water seepage onto dock).

[75] *See* MC Co., ASBCA No. 21403, 78-2 BCA ¶ 13,313 (although contractor knew of high water content of soil, the speed at which it caused soil to deteriorate was unusual).

[76] *See* The Arthur Painting Co., ASBCA No. 20267, 76-1 BCA ¶ 11,894 (even after the contractor properly removed old paint, additional old paint inexplicably peeled and lifted).

[77] *See* J.J. Barnes Constr. Co., ASBCA No. 27876, 85-3 BCA ¶ 18,503 (not uncommon for buildings constructed in that era to have uneven floors and out of plumb columns); Lyburn Constr. Co., ASBCA No. 29581, 85-1 BCA ¶ 17,764 (not unusual to find thick paint coating); Northwest Painting Service, Inc., ASBCA No. 27854, 84-2 BCA ¶ 17,474 (soft, sacked concrete in walls not uncommon, although contractor was unaccustomed to it).

[78] *See* Fred A. Arnold, Inc., ASBCA No. 20150, 84-3 BCA ¶ 17,624 (muddy soil encountered near reservoir); Commercial Mechnical Contractor's Inc., ASBCA No. 25695, 83-2 BCA ¶ 16,768 (site on flood plain); James E. McFadden, ASBCA No. 19931, 76-2 BCA ¶ 11,983, *aff'd on reconsideration*, 79-2 BCA ¶ 13,928 (subsurface water encountered on site in Delaware River basin and adjacent to Delaware River and Frankford Creek); Robert McMullan and Son, Inc., ASBCA No. 22168, 78-2 BCA ¶ 13,228 (subsurface water on site 10 feet above sea level and 700 yards from salt water bay); Ellis Constr. Co., ASBCA No. 19541, 75-1 BCA ¶ 11,238 (site on alluvial flood plain near river).

[79] *See* Callaway Landscape, Inc., ASBCA No. 22546, 79-2 BCA ¶ 13,971 (normal to find underground utilities in housing areas).

[80] *See* C&L Constr. Co., ASBCA No. 22993, 81-1 BCA ¶ 14,943, *aff'd on reconsideration*, 81-2 BCA ¶ 15,373 (contractor had performed at least 20 other contracts at this base and was aware of the propensity for subsurface water); Joseph Morton Co., ASBCA No. 19793, 78-1 BCA ¶ 13,173, *modified on other grounds*, 80-2 BCA ¶ 14,502 (contractor was familiar that removal of wainscot would require the removal of glue or mastic).

[81] *See* COVCO Hawaii Corp., ASBCA NO. 26901, 83-2 BCA ¶ 16,554 (subsurface lava beds are common to Hawaii); TGC Contracting Corp., ASBCA No. 24441, 83-2 BCA ¶ 16,764, *aff'd sub nom.* TGC Contracting Corp. v. United States, 736 F.2d 1512 (Fed. Cir. 1984) (coal tar pitch roofs are commonplace in New Cumberland, PA); White Cap Painters, ASBCA No. 25364, 81-2 BCA ¶ 15,195 (lifting and peeling of paint is common at Fort Devens due to extreme moisture in the air); Fairbanks Builders, ASBCA No. 18288, 74-2 BCA ¶ 10,971 (muddy soil due to spring thaw is not unusual in Alaska). *But see* Edgar M. Williams, General Contractor, ASBCA No. 16058, 72-2 BCA ¶ 9734 (double roofs common to Fort Polk were found to be unusual, because not common elsewhere).

[82] J.J. Welcome Constr. Co., ASBCA No. 19653, 75-1 BCA ¶ 10,997.

[83] *See supra* note 2; *see also* Ed Goetz, Jr., ASBCA No. 21369, 77-1 BCA ¶ 12,544.

[84] Leiden Corp., ASBCA No. 26136, 83-2 BCA ¶ 16,612; Hoyt Harris Inc., ASBCA No. 23543, 81-1 BCA ¶ 14,829.

government has been prejudiced.[85] The board will consider four factors when testing for prejudice. First, did the contracting officer know or should he have known of the condition?[86] Second, was the condition an emergency that had to be rectified immediately and could not have awaited the giving of notice?[87] Third, did the contracting officer have an opportunity to verify the existence of the condition?[88] Fourth, if the contracting officer had been given prompt notice, could he have directed alternate corrective action that would have reduced the cost incurred by the contractor to overcome the condition?[89] If the board finds that the last two factors are present, then it will find prejudice per se and disallow the claim.[90]

Even if prejudice is not found, however, the board will still require the contractor to bear a greater burden of persuasion to substantiate the claim than if notice had been given.[91] The board appears to conclude that because no notice was given, most of the evidence of the condition and its affect will be in the contractor's possession, instead of the government's possession.

Also, on occasion the board has concluded that the failure to give notice indicates that the contractor must not have believed that it encountered a materially differing site condition. The board's reasoning has been that had the contractor believed otherwise, it would have given notice immediately.[92] Therefore, the contemporaneous conduct of the contractor often will be accorded great weight.

Equitable Adjustment

If the contractor proves that a differing site condition increased its costs or delayed contract performance, the contractor is entitled to an equitable adjustment.[93] The adjustment includes the cost or delay of performing the work necessary to overcome the condition, and the indirect cost and delay encountered in or pertaining to the performance of unchanged work.[94] The adjustment includes not only the costs of materials and labor, but also incidental expenses such as increases in the contractor's bond premiums due to the increased cost of the contract attributed to overcoming the condition.[95]

Contracting officers must be vigilant in discovering differing site conditions that result in a decrease in the contractor's costs. It is not surprising that there are no reported decisions in which the government requested a downward adjustment under the differing site conditions clause. Most contractors will not formally bring such matters to the attention of the contracting officer. Therefore, the contracting officer should instruct his inspectors to be alert to such conditions. They will probably learn of such conditions through informal discussions with the contractor's employees while visiting the site, or from indicators such as the project being inexplicably ahead of schedule.

If the government asserts a downward adjustment, the ASBCA will probably require the government to bear the burden of proving entitlement. This is what the board has done in other instances in which the government has sought a downward adjustment under contract provisions unrelated to the differing site conditions clause.[96]

Conclusion

The ASBCA has consistently required contractors to substantiate their claims under the differing site conditions clause by a preponderance of the evidence. Frequently, the government loses cases because it is unable to refute the evidence presented by the contractor. This inability is usually due to the government's failure to investigate the claim in a timely manner. It is incumbent upon the contracting officer to investigate all allegations of differing site conditions and preserve all evidence.

The contract attorney should assist the contracting officer by advising him as to what investigative actions to take and what evidence to preserve. Photographs of the condition and testimony of experts who witnessed the condition at the job site are very persuasive to the board.

Government contract personnel, however, must remember that the differing site conditions clause ultimately benefits the government through lower bids. Thus, contracting officers should make equitable adjustments when contractors in fact encounter unknown and unusual conditions that differ materially from those ordinarily

---

[85] Sturm Craft Co., ASBCA No. 27477, 83-1 BCA ¶ 16,454; J.J. Welcome Constr. Co., ASBCA No. 19653, 75-1 BCA ¶ 10,997.

[86] *See* Leiden Corp., ASBCA No. 26136, 83-2 BCA ¶ 16,612; C.& L. Constr. Co., ASBCA No. 22993, 81-1 BCA ¶ 14,943, *aff'd on reconsideration*, 81-2 BCA ¶ 15,373; *see also* Hoyt Harris Inc., ASBCA No. 23543, 81-1 BCA ¶ 14,829 (government knew of existence of swamp onsite).

[87] *See* Sturm Craft Co., ASBCA No. 27477, 83-1 BCA ¶ 16,454 (condition encountered caused runway lights to malfunction on a weekend; expeditious action by contractor was necessary to restore lights).

[88] *See* AAAA Enterprises, Inc., ASBCA No. 28172, 86-1 BCA ¶ 18,628 (Government first informed of condition 1 year after all materials had been excavated); C.& L. Construction Company, Inc., ASBCA No. 22993, 81-1 BCA ¶ 14,943, *aff'd on reconsideration*, 81-2 BCA ¶ 15,373; DeMauro Construction Corporation, ASBCA No. 17029, 77-1 BCA ¶ 12,511.

[89] *See* AAAA Enterprises, 86-1 BCA ¶ 16,454; C.& L. Constr., 81-1 BCA ¶ 14,943.

[90] Schnip Building Co., ASBCA No. 21637, 78-2 BCA ¶ 13310, *aff'd sub nom.* Schnip Building Co. v. United States, 645 F.2d 950 (Ct. Cl. 1981); DeMauro Constr. Corp., ASBCA No. 17029, 77-1 BCA ¶ 12,511 (contractor dumped unanticipated rock in the ocean where it dispersed before government could verify its existence); Carson Linebaugh, Inc., ASBCA No. 11384, 67-2 BCA ¶ 664 (notice not given until three months after work was completed).

[91] C.H. Leavell & Co., ASBCA No. 16099, 72-2 BCA ¶ 9694.

[92] C.&L. Constr. Co., ASBCA No. 22993, 81-1 BCA ¶ 14,943, *aff'd on reconsideration*, 81-2 BCA ¶ 15,373.

[93] *See supra* note 2.

[94] This was not always the rule. Previously, the *Rice* doctrine precluded recovery for the costs pertaining to the performance of unchanged work. United States v. Rice, 317 U.S. 61 (1942). *See generally* Comment, *The* Rice *Doctrine After Twenty-Five Years: Bloody But Unbowed*, 39 U. Colo. L. Rev. 533 (1967). In 1967, the differing site conditions clause was modified to eliminate the application of the *Rice* doctrine. *See supra* note 2.

[95] *See* Warren Painting Co., ASBCA No. 20818, 76-1 BCA ¶ 11,881.

[96] *See* Reading Clothing Mfg. Co., ASBCA No. 4153, 57-2 BCA ¶ 1454 (government sought a reduction because the contractor deviated from the specifications); *see also* Perini Corp. v. United States, 381 F.2d 403 (Ct. Cl. 1967) (government sought a reduction because the estimated quantity in the solicitation was greater than the actual amount of water that the contractor had to pump; the court found no changed condition and denied the claim).

encountered. Careful investigation and preservation of evidence are the keys to separating valid claims from those where no adjustment is due.

Lawyer Referral . . . Do's and Taboos

*Mark E. Sullivan**

Anyone familiar with the day-to-day operation of legal assistance offices in the armed forces knows that the legal assistance attorney must be, in the finest sense, a general practitioner. Knowledge of substantive areas such as divorce, landlord-tenant law, consumer protection, naturalization and immigration, and bankruptcy is vital in the competent counseling of each day's clients. The military attorney must also possess certain office-related skills, such as accurate drafting of contracts and correspondence, courtesy and persuasive ability on the telephone, and basic techniques of office counseling. But one of the major duties of the legal assistance officer (LAO), lawyer referral, is often misunderstood or neglected.

The Importance of Lawyer Referral

Lawyer referral is a primary function of the LAO. Members of the civilian bar across the nation receive thousands of client referrals every day from military legal assistance offices. Every branch of the services has a provision in its legal assistance regulations regarding lawyer referral, and every installation providing legal assistance services must also provide lawyer referral for clients. Even bases with an Expanded Legal Assistance Program (ELAP) need a good lawyer referral system for those clients not meeting the eligibility guidelines for ELAP representation. At most military legal offices lawyer referral is big business.

It is also good business. Everyone benefits when the LAO properly and competently refers clients to civilian counsel. The LAO gains an ally who can proceed to court, if necessary, to assert or defend the rights of the client. The civilian attorney receives a new source of business and a fresh case for representation, counseling, and assistance. Finally and most important, the client gains an advocate, in trial or negotiation, to handle matters that are outside the mandate of the LAO or beyond his level of skill and expertise.

That's the way the system is *supposed* to work. But does it always work that way?

Problems and Pitfalls

A broad overview of legal assistance offices reveals that—most of the time—lawyer referral is handled competently, courteously, and professionally. But major problems are occasionally present. These must be identified and avoided at every opportunity by the alert staff judge advocate or chief of legal assistance. Here is the pulsebeat of flawed lawyer referral:

—Lack of a system at all. "Golly, Sergeant Brown, it looks like you need a lawyer from downtown to help you fight this eviction notice. Who? No, we can't give out specific names here—might look bad, you know. However, there's a telephone directory over at the front desk if you want to look at the Yellow Pages."

—Appearance of favoritism. "I think you need a civilian attorney, Mrs. Gray. I recommend you go see Bill Black, a lawyer downtown who's one of our assigned Reservists here at Camp Swampy. I always refer divorce cases to him."

—Insufficient follow-through. "You need a civilian lawyer to handle this interstate child-snatching case, Mrs. White. I can't do anything further for you. Lawyer referral? Sure we have a lawyer referral system here in the office—just call this toll-free number to the bar association and they'll give you the names of some lawyers who can help you. I wish I could help more, but there's nothing further to do when we make a referral out of this office."

—Lack of background and experience. "I sure wish I could name some lawyers for you that take bankruptcy cases, Captain Brown, but I've only been stationed here a year. I really don't know any civilian lawyers. I haven't been to any of the local bar association meetings yet."

Referral With a Heart

Good lawyer referral avoids these mistakes. It is professionally done with courtesy and concern. It is the province of the LAO who needs to engage an ally, a co-counsel, to assist a client—not to get rid of a client that can't be helped in the JAG office. It is, in short, lawyer referral with a heart.

With an eye to service regulations and the many ways of running lawyer referral services across the nation, here are some precepts for the practitioner in uniform:

1. Don't be evasive. Tell the client as soon as possible if you cannot handle the problem and cite the reason—outside the scope of your assigned duties (representation of a client at a crash investigation board or before a disability review panel), barred by local directive (preparation of complex trusts) or by service regulations (criminal charges in civilian court, fee-generating cases, or private business matters) or beyond the scope of your expertise (such as complex wills and estate planning). Clients respect the straightforward approach. They will appreciate your efforts

*Mr. Sullivan is Chairman of the American Bar Association's Standing Committee on Legal Assistance for Military Personnel. He is a member of the North Carolina State Bar's Special Committee on Military Personnel and the Governor's Advisory Commission on Military Affairs. He serves as a Major in the U.S. Army Reserve, currently assigned as the Chief (IMA), Legal Assistance Section, Office of the Staff Judge Advocate, XVIII Airborne Corps, Fort Bragg, North Carolina.

to make a referral all the more if you are forthright and to-the-point.

2. Avoid unnecessary referrals. Does your client already have a lawyer? Or did she or he have one from the local community on some prior occasion? Does she have one in mind already that she plans to visit? Does he know of one who helped his neighbor on a similar case last year? There is nothing wrong with "word-of-mouth" referral when it originates with the client. Many times the best lawyer for *this* eviction client is the one that helped his co-worker, Airman Green, with a landlord problem just recently. Use blind referrals only as last resort.

3. Go the extra mile. If Mrs. White needs a civilian attorney and doesn't know where to go, it is entirely proper and ethical for the LAO to help her select an attorney instead of just handing her the phone book, giving her a toll-free number to call, or providing the next three lawyers' names from the referral list. Help her pick out the name of a lawyer to contact and then . . . pick up the phone! Why not call that attorney and find out if he or she:

—Will handle this type of case?

—Charges an initial consultation fee?

—Will take the case on a contingent fee arrangement, for a flat fee or at an hourly rate?

—Is available for an interview at a time convenient to your client?

—Has handled cases like this before?

—Can quote an approximate cost to the client for the work to be performed?

Lawyers love to get new clients, but they also love to talk attorney-to-attorney to the LAO who is doing the referring. This is the best way for them to find out, in the LAO's own opinion, what is involved in the case, how cooperative the client is, and what are the problems and deadlines. Don't be afraid to do a direct referral—some clients need a little (or a lot of) "handholding" in the process of selecting a lawyer. As a trained lawyer yourself, you can vastly improve the likelihood of Mrs. White's choosing a good lawyer, the right lawyer for her case, by using this technique.

4. Don't pick favorites. Trying to help Captain Brown with her bankruptcy case does not mean sending her to the same lawyer in town that handles all other bankruptcy referrals from the base. Favoritism, gratuities, and the appearance of impropriety must be avoided in every lawyer referral system, civilian as well as military. Service regulations forbid the consistent singling out of one lawyer for specific referrals, regardless of motive or intent. A broad base of civilian practitioners is essential to a lawyer referral system that is run ethically and openly.

5. Get out and meet the local bar. How will you ever know that Lawyer Wilson only does criminal defense work or Lawyer Smith doesn't do divorces if you don't get out of your office occasionally? Find out when the local bar meets and talk to your SJA or chief of legal assistance about attending a meeting. In most cases you will receive the go-ahead and will be surprised at how enjoyable the company is when you attend that first meeting. Many civilian lawyers near military bases have prior JAG experience themselves and will welcome the presence of an active duty JAG officer. Civilian attorneys also need help with problems that involve the military community and can readily use your advice, insights, and contacts. And where else can you pick up those garnets of legal wisdom that will help your legal assistance clients such as the ones below?

—The first continuance request by civilian counsel is usually granted; if you don't have a civilian lawyer, you must be present personally to make the request—a spouse, friend or relative can't do it for you.

—Judge Jones doesn't usually give custody to fathers on the theory that "Daddies don't make good mommies," and Judge Barnes will deny custody or visitation rights if there is any evidence of a live-in boyfriend for the mother.

—The district attorney doesn't negotiate pleas on second-offense drunk driving.

—Even if you get evicted in magistrate's court, you can still stop the eviction by taking an appeal to district court. The truth is that very little of what matters to the legal assistance client in court comes out of books; most of it will be found by observing what goes on in the courtroom or talking to other lawyers. You can always give a better-informed referral if you associate regularly with the local bar.

6. Be creative. Sometimes a local bar connection won't solve your problems because your clients need a lawyer in Tulsa or Tucson—what then? Assuming your client does not know any lawyers in that locale, locating a lawyer for, say, a domestic matter, involves more than just reaching for the Oklahoma volume of *Martindale-Hubbell*, or finding the phone number for Tucson Lawyer Referral. Here are some creative methods of referral:

—Call a local base or installation SJA office and ask for several lawyers' names and phone numbers for a family law referral.

—Pull out your *Directory of Drilling Naval Reservists*, Judge Advocate Association directory, or printout of Army Reservists to find an initial lawyer contact in the locale, and then get that attorney's counsel and advice on some specific lawyers for this domestic referral.

—Get the name of the chair or vice-chair of the family law section of the state bar from that organization in the state capital; then ask him or her to recommend an expert in the locale you wish. Many times such an officer will have a personal friend or professional contact in that vicinity who can help out.

7. Shop around. Selecting the right lawyer involves a balance among availability, price and quality. You can assist your clients in this choice, especially if you are stationed far from the location of the forum, you:

—Introduce yourself and the client;

—Describe the problem and legal issues;

—Solicit a response including proposed course of action and fee estimate.

There will, of course, be some "no-show" lawyers who fail to respond. But for those that *do* respond, the quality of the response and the quoted fee will usually solve the referral question.

8. Use handouts for guidance. Printed below is an example of the *TAKE-1* pamphlet, "You and Your Lawyer," that is used at Ft. Bragg, in lawyer referral. Such handouts

can answer additional questions that the client might forget to ask at the legal assistance office.

9. Educate the client on what to expect. Now that you've helped Mrs. Brown select a civilian lawyer, don't just send her on her way. The courteous and competent LAO will want his client to know some important facts about private counsel. Consider advising her about her private attorney; the following is an example taken from Florida's "Statement of Clients' Rights":

> Before you, the prospective client, arrange a contingent fee agreement with a lawyer, you should understand this statement of your rights as a client. This statement is not a part of the actual contract between you and your lawyer, but, as a prospective client, you should be aware of these rights:
>
> —The client has the right to discuss and bargain about the proposed fee and the rate or percentage of fees. No law states that a lawyer must charge a set fee or a percentage of money recovered in a case.
>
> —Contingent fee contracts must be in writing, and clients have three business days to reconsider or cancel the contract.
>
> —Before the contingent fee contract is signed, the lawyer must tell the client if he plans to handle the case alone or with the help of other lawyers. If the case is referred, the lawyer must inform the client of the fee-sharing arrangement. If lawyers from different firms handle the case, a lawyer from each firm must sign the contract.
>
> —The lawyer must tell the client at the beginning if he plans to refer to or use other counsel in the case. A new contract must be written if the referral happens at a later date. The client has the right to consult with all lawyers working on the case, and the lawyers are legally responsible for representing the interests of the client and for the acts of other lawyers handling the case.
>
> —The client has the right to know at the beginning the arrangements for payment of expenses and legal fees. If a deposit is required, the client must be told how the money will be spent. The lawyer should offer an estimate of future costs. The client is entitled to know how and how much money has been spent.
>
> —The lawyer should tell the client about possible adverse consequences if the case is lost, i.e., money for costs or liability for fees for opposing counsel.
>
> —Before paying a bill, the client is entitled to a closing statement, listing all financial details of the case.
>
> —At reasonable intervals, the client can ask the lawyer about the progress of the case.
>
> —The client has the sole right to make final decisions on settlement of a case.
>
> —The client has the right to contact The Florida Bar or a local bar association if he believes fees charged are excessive or illegal.

10. Read 'em their rights. The following ten commandments are taken from an article in the ABA's *Bar Leader* (January–February 1988) on lawyer-client relationships. It is an excellent expression of the client's rights and the lawyer's responsibilities. Have your clerk or secretary make a copy to pass out to each client that is referred to civilian counsel.

> When I retain a lawyer, I am entitled to one who:
>
> —Will be capable of handling my case.
>
> —Will represent me zealously and seek any lawful means to present or defend my case.
>
> —Will preserve my confidences, secrets or statements which I reveal in the course of our relationship.
>
> —Will give me the right to make the ultimate decision on the objectives to be pursued in my case.
>
> —Will charge me a reasonable fee and tell me, in advance of being hired and upon my request, the basis of that fee.
>
> —Will show me courtesy and consideration at all times.
>
> —Will exercise independent professional judgment in my behalf, free from compromising influences.
>
> —Will inform me periodically about the status of my case, and, at my request, give me copies of documents prepared.
>
> —Will exhibit the highest degree of ethical conduct.
>
> —Will refer me to other legal counsel, if he or she cannot properly represent me.

Conclusion

Lawyer referral really helps everyone involved. It should be accomplished in a kind and competent manner when the situation requires sending the client elsewhere for legal help. Properly done, this service guides clients in the right direction for help from a qualified professional, complies with ethical requirements for competent practice and is the first key to avoiding malpractice.

DAD Notes

The Constitutionality of "Show and Tell"—The Court of Military Appeals Says: Yes, No, Maybe So.

In *United States v. Lee*[1] the Court of Military Appeals had to decide whether a regulation that requires United States military personnel in the Republic of Korea to produce or account for certain duty-free controlled items[2] constituted a per se fifth amendment and/or Article 31, UCMJ[3] violation. The provision in question is generally known as the "show and tell" requirement. As the title of this note reflects, the court did not definitively answer the question.

Judge Sullivan, who authored the lead opinion, found it unnecessary to decide the per se constitutionality of the regulation because it had been applied to the accused in *Lee* in an unconstitutional manner.[4] Judge Sullivan determined that any attempt to obtain a statement from an individual who is already considered a suspect requires Article 31 warnings despite a regulatory scheme that authorizes law enforcement officers and commanders to order a "show and tell" accounting.[5]

Chief Judge Everett concurred in *Lee*, but explicitly found that the fifth amendment and Article 31 foreclosed any "trial by court-martial under Article 92 of the Uniform Code."[6] Clearly, the Chief Judge believes the regulation is unconstitutional per se. Judge Cox concurred in part and dissented in part. Judge Cox would have suppressed any statements obtained without a rights warning, but would have let stand the conviction for failing to "show and tell," as he found the provision lawful.[7] Judge Cox also pointed out that the court's decision in *Lee* leaves the per se constitutionality of the regulation an open question. Because *Lee* was a contested case, its precedential value in guilty plea cases may be questionable. Most of the guilty plea cases in which the application of the "show and tell" requirement was not specifically raised at the trial level have been remanded to the Court of Military Review for consideration in light of *Lee*.

The few cases that the Court of Military Appeals has decided in light of *Lee*[8] involved instances where application of the regulation was contested at trial (this is only revealed by examination of the records of trial, as the Court of Military Appeals issued only summary dispositions). Application of the "show and tell" regulation was contested either by way of a motion preceding pleas that included some allegation that the regulation was unlawfully applied; by a motion to suppress statements made at the "show and tell;" or by a motion for a finding of not guilty.

It should be noted that three of the decided cases involved guilty pleas.[9] Although not stated in any dispositions, the court likely used the same reasoning relied on in *United States v. Reed*[10] in finding that unconstitutional application of a regulation was not waived by a guilty plea. *Reed* involved a Marine who pleaded guilty to violating a regulation requiring members of the naval service to report offenses they witness. The Court in *Reed* split much the same way as in *Lee*.[11] Judge Sullivan wrote the lead opinion, and on the issue of per se unconstitutionality found the "challenges to this regulation inapplicable."[12] In what may be a precursor of how the court will deal with the remaining "show and tell" cases, Judge Sullivan found that the providence inquiry did not resolve the issue of the regulation's unlawful application, as appellant providently pleaded guilty to using marijuana between dates that included the date he allegedly violated Article 92 of the Uniform Code by not reporting a fellow Marine's marijuana use. Judge Sullivan reasoned that these facts raised a question as to whether the accused in *Reed* could invoke a defense based on "his being an accessory or principal to the

---

[1] 25 M.J. 457 (C.M.A. 1988).

[2] United States Forces Korea (USFK) Regulation 27–5.

[3] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982) [hereinafter UCMJ].

[4] 25 M.J. at 460–62.

[5] The applicable regulatory provisions do not mention either the fifth amendment or UCMJ art. 31. *See* 25 M.J. at 458 nn. 1, 2.

[6] 25 M.J. at 463.

[7] *Id.* at 464–70.

[8] See United States v. Caraballo, ___ M.J. ___ (C.M.A. 31 March 1988) (summary disposition); United States v. Fernau, ___ M.J. ___ (C.M.A. 31 March 1988) (summary disposition); United States v. Holman, ___ M.J. ___ (C.M.A. 31 March 1988) (summary disposition); United States v. Jeter, ___ M.J. ___ (C.M.A. 31 March 1988) (summary disposition); United States v. Valree, ___ M.J. ___ (C.M.A. 31 March 1988) (summary disposition).

[9] *Fernau*; *Jeter*; *Valree*.

[10] 24 M.J. 80 (C.M.A. 1987).

[11] Judge Sullivan found the regulation was unconstitutional as applied, while Chief Judge Everett found it unconstitutional per se, and Judge Cox dissented.

[12] 24 M.J. at 82.

illegal activity he failed to report."[13] Rather than remand the case, the challenged specification was dismissed in the interests of judicial economy.

Defense counsel can fashion an argument analogous to *Reed* for most guilty pleas involving "show and tell" violations. In most of the cases, the accused is also charged with overpurchasing, and/or wrongfully transferring the items that he or she could not produce at the "show and tell." As the providence inquiry generally gives rise to some evidence that the accused was already suspected of blackmarketing when he was ordered to "show and tell," the military judge may have to conduct an expanded providence inquiry.

Under facts similar to those in *Lee*, defense counsel should vigorously contest the regulation's application. Given Judge Sullivan's statement in *Lee* that "it was plain error for the judge to fail to consider whether the military police . . . evade[d] the requirements of Article 31 and the fifth amendment,"[14] advice by defense counsel to a client to plead guilty are likely to give rise to allegations of ineffective assistance of counsel. Further, defense counsel should also move to suppress any statements or derivative evidence obtained as a result of an unlawful "show and tell" insofar as they apply to charges of overpurchasing, wrongful transfer, false official statement, or false swearing.

Although a majority of the Court of Military Appeals has yet to find that "show and tell" constitutes a per se fifth amendment, violation, the *Lee* Court was unanimous in its finding that the regulation was used, in that case, to obtain evidence in violation of the fifth amendment. This holding should serve to severely limit the way the regulation has been routinely used to obtain evidence.[15] Captain James E. O'Hare.

The Hazards of Governmental Creativity

Two wrongs do not make a right; one wrong does not necessarily make a crime. Although a military commander may instinctively wish to pursue a soldier's impropriety to judicial disposition, not all inappropriate conduct by a soldier is punishable under the Uniform Code of Military Justice. Where no specific article of the Uniform Code of Military Justice clearly embraces a soldier's conduct, the command may resort to article 134[16] only where the conduct is criminal, not merely improper or undesirable.

The first clause of Article 134 is properly used to punish acts that involve "disorders and neglects to the prejudice of good order and discipline in the armed forces"[17] that are not preempted by specific articles of the U.C.M.J.[18] To succeed in a prosecution under the first clause, the government must be able to prove that the acts were directly prejudicial to good order and discipline. Only where the "prejudice is reasonably direct and palpable" will improper actions be an offense.[19] The drafters of the Manual for Courts-Martial recognized that "[a]lmost any irregular or improper act on the part of a member of the military service could be regarded as prejudicial in some indirect or remote sense,"[20] and they sought to guard against potential overreaching by the government.

The appellate courts as well have assumed a protective position against the improper use of the first clause as a "catchall as to make every irregular, mischievous, or improper act a court-martial offense."[21] According to the Army Court of Military Review, the first clause requires that conduct "must be easily recognizable as criminal; must have a direct and immediate adverse impact on discipline; and must be judged in the context in which the years have placed it."[22]

The Army Court of Military Review examined this issue in *United States v. Minor*,[23] and treated it as one of sufficiency of the specification to allege an offense.[24] In *Minor*, the specifications detailed financial transactions between a noncommissioned officer and trainees. The court found that the specifications were insufficient[25] because of their failure to refer to the accused's position as a drill sergeant, even

---

[13] *Id.* at 83.

[14] 25 M.J. at 461.

[15] Examination of the records and allied papers in those Army cases that have gone before the Court of Military Appeals, and/or are now before the Army Court of Military Review, all reveal some evidence that the accused was already a suspect prior to the "show and tell" order. In the typical scenario the soldier was ordered to go to a Criminal Investigation Division or military police investigator as a result of a computer printout showing overpurchases. The law enforcement officers then ordered the soldier to "show and tell." Even if the soldier gave incriminating statements, generally no UCMJ art. 31 rights warning was given until after the failure to show proper disposition.

[16] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ].

[17] *Id.*

[18] Manual for Courts-Martial, United States, 1984, Part IV, paras. 60c(1) and 60c(5)(a).

[19] *Id.* para. 60c(2)(a).

[20] *Id.*

[21] United States v. Stocken, 17 M.J. 826, 829 (A.C.M.R. 1984) (quoting United States v. Sadinsky, 14 C.M.A. 563, 565, 34 C.M.R. 343, 345 (1964)).

[22] *Stocken*, 17 M.J. at 829.

[23] United States v. Minor, 25 M.J. 898 (A.C.M.R. 1988).

[24] The evidence introduced at trial cannot be used to bolster the sufficiency of the specification. *Minor*, 25 M.J. at 901 (citing United States v. Sell, 11 C.M.R. 202, 206 (C.M.A. 1953)). When findings of guilty are based on pleas of guilty, however, the Army court generally will not reverse if "the specification is not so defective that it 'cannot within reason be construed to charge a crime,' the accused does not challenge the specification at trial, pleads guilty, has a pretrial agreement, satisfactorily completes the providence inquiry, and has suffered no prejudice." United States v. Watkins, 21 M.J. 208, 210 (C.M.A. 1986). In *Minor*, the specification was not challenged at trial, the accused pled guilty pursuant to a pretrial agreement, and the military judge found the pleas to be provident. Nevertheless, not even an allegation that the conduct was to the prejudice of the good order and discipline of the armed forces was enough to salvage the specification. *Minor*, 25 M.J. at 902.

[25] Failure to state an offense is not waived if not raised at trial, but specifications are viewed with greater tolerance when attacked for the first time on appeal. Rule for Courts-Martial [R.C.M.] 907(b)(1)(B); *Watkins*, 21 M.J. at 209.

though they referred to his rank as a noncommissioned officer.[26]

Chief Judge Holdaway, in his concurring opinion in *Minor*, went one step further by saying that a trainer and trainee relationship itself was not enough to survive examination under the first clause.[27] Instead, the circumstances surrounding the foundation of the relationship, for example a financial arrangement, must be prejudicial to discipline.[28] Chief Judge Holdaway's position requires the government to specify those circumstances that make the conduct prejudicial.

Chief Judge Holdaway's position is sound. To be sufficient, a specification must give notice of every element of the offense.[29] The additional words alleging specific prejudice are necessary under the first clause to provide notice of wrongfulness and notice of what the soldier must defend against. Where the offense is "made up" under Clause 1, the words alleging specific prejudice compensate for the absence of the common knowledge and understanding of criminal wrongfulness which is assumed in common law offenses.

Even if the specification survives the critical examination of sufficiency, the court-martial, and, in turn, the appellate courts have the ability to examine the evidence, or facts elicited during the providence inquiry, to determine whether the record demonstrates the element of prejudice to the good order and discipline of the armed forces.[30] Thus, although many of the reported cases in this area examine only the sufficiency of the specification, sufficiency of the evidence provides an alternative approach for trial defense counsel to consider when faced with offenses alleged under the first clause of article 134.

Trial defense counsel are encouraged to challenge the propriety of improper charging at the trial level. If the conduct factually is not punishable as an offense, litigation at the appellate level serves no tactical advantage.[31] Soldiers will be best served by a sentence adjudged solely on the basis of offenses properly supporting guilt. Where a client has already served a sentence to confinement prior to resolution of the issue in the appellate courts, relief is then generally insufficient and insignificant. Major Kathleen A. VanderBoom.

Carter: a New Challenge for the Defense Counsel

United States v. Carter,[32] a recent decision by the Court of Military Appeals, overruled the decision in *United States v. Holley*.[33]

Article 41 of the Uniform Code of Military Justice, 10 U.S.C. § 841 (1982) authorizes the use of peremptory challenges to ensure the fairness and the appearance of fairness in the selection of members for a court-martial. In *Carter*, Chief Judge Everett noted that the interpretation of article 41 by the majority in *Holley* produced an inherent chilling effect on the use of peremptory challenges by defense counsel. Congress has attached significant importance to the use of peremptory challenges. Procedural rules cannot be used to chill the accused's use of peremptory challenges.

This chilling effect is evident when a defense counsel is faced with the dilemma of using a peremptory challenge that would result in the panel membership falling below a quorum. The convening authority must then detail additional members to the panel, but the defense counsel was prohibited from exercising any additional peremptory challenges. In these situations defense counsel often faced the dilemma of deciding between a "known evil" or an "unknown evil" that could be worse. The *Carter* decision may end this predicament for defense counsel.

In *Carter*, the Court of Military Appeals held that in order to ensure a fair trial the military judge, in his discretion, may grant the accused an additional peremptory challenge when the defense has used its peremptory challenge, the panel has been reduced below a quorum, and additional members have been appointed to the panel. Because denial by the military judge of a request for an additional peremptory challenge will be reviewed on appeal for abuse of discretion, trial defense counsel are advised to always request additional peremptory challenges under such circumstances and establish, on the record, the basis of a military judge's denial of such a request. Captain Mary C. Cantrell.

---

[26] Had the government alleged the offense as occurring between a trainer and his trainees in *Minor*, the Army Court of Military Review might have found the specifications sufficient. In discussing the sufficiency of specifications alleging violations of the first clause of article 134, the Army court noted that United States v. Light, 36 C.M.R. 579 (A.B.R. 1965) had distinguished United States v. Calderon, 24 C.M.R. 338 (A.B.R. 1957), on the basis that borrowing by a training noncommissioned officer from a trainee in his unit is *per se* wrongful. *Minor*, 25 M.J. at 901. Because that relationship was not alleged in *Minor*, however, the specification was deficient regardless of the evidence. To the extent that the Army court has adopted the position of *per se* wrongfulness as an evidentiary standard, this conclusion is unfounded. Such a mandatory presumption would improperly shift the burden of proof to an accused. *See generally* Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979).

[27] Chief Judge Holdaway wrote in *Minor* that, in the absence of a regulation making undesirable behavior criminal, "[i]t is not reasonable . . . to brand an otherwise lawful, indeed innocent, act as criminal because there is merely a potential for abuse." *Minor*, 25 M.J. at 903.

[28] *Id.*

[29] R.C.M. 307(c)(3).

[30] This was the approach of the Army Board of Review in *Light*, 36 C.M.R. at 579. Although the Army board examined the evidence in its resolution of the case, the specification would not have survived muster had that been the focus of the board's effort. *Id.* at 580. In *Calderon*, the Army Board of Review examined the sufficiency of the specification to allege an offense. This was also the focus of the Army Court of Military Review in *Stocken* and the Court of Military Appeals in *Sadinsky*. The Navy-Marine Corps Court of Military Review examined both the sufficiency of the specification and the evidence in United States v. Smith, 25 M.J. 545 (N.M.C.M.R. 1987) ("mere failure to discharge one's obligations, without more, does not constitute an offense under Article 134").

[31] No amount of manipulation by the government will transform the actions into an offense at that point. Subsequent trial, however, may be had on specifications dismissed as insufficient. Furthermore, the government may be able to pursue an offense when a specification was dismissed as insufficient and the statute of limitations has expired. To fall within this protection, the new specification must allege the same acts or omissions and the specification must reach the summary court-martial convening authority within 180 days after the dismissal of the original specification. U.C.M.J. art. 43, 10 U.S.C.A. § 843 (West Supp. 1988).

[32] 25 M.J. 471 (C.M.A. 1988).

[33] 17 M.J. 361 (C.M.A. 1984).

Credit Where It's Due

A recent DAD Note[34] reminded defense counsel that litigating pretrial confinement or restriction issues is often one of the few ways to gain relief for the client. Defense counsel were thus advised to urge military judges to rely on the recent Army Court of Military Review decision, *United States v. DeLoatch*.[35] In light of two recent unpublished decisions of the Army court, that advice warrants reemphasis.

In *United States v. Feimster*[36] and *United States v. Teeter*,[37] the *DeLoatch* rule was adopted and extended by another panel of the court of military review. In *DeLoatch*, the accused was placed in pretrial confinement on January 29, and a magistrate's review was held on February 6. The court found that the accused was entitled to additional credit pursuant to R.C.M. 305(k) for failure to conduct a review in accordance with R.C.M. 305(i). The period in question was determined to be nine days; not eight, as the parties had assumed at trial.[38] The court held that when calculating credit due pursuant to R.C.M. 305(k) both the day confinement is imposed and the day of review by the magistrate count as days of confinement.[39] In applying this "first day-last day" rule, the court declined to follow the method of computation used in *United States v. New*.[40] In *New*, a different panel of the Army Court of Military Review held that the accused, who was on restriction tantamount to confinement from 12–19 June, was entitled to *Mason* credit and R.C.M. 305(k) credit[41] of seven days each. The court held that, for the purpose of determining this credit, the last day served in restriction tantamount to confinement should be counted, but the first day should not.[42]

In *United States v. Feimster*,[43] the accused was placed in pretrial confinement[44] on September 3 and remained confined until September 8, the date of his trial. The military judge and convening authority granted five days credit.[45] The Army Court of Military Review, however, applying the *DeLoatch* "first day-last day" rule, held that the accused was entitled to six days credit.

Similarly, in *United States v. Teeter*,[46] the same panel again extended the *DeLoatch* rule. In *Teeter*, the court directly addressed the computation of credit as it related to restriction tantamount to confinement (*Mason* credit) previously decided in *New*. The accused was placed on restriction tantamount to confinement on September 3 and remained on restriction until September 7. The military judge found that the accused was entitled to credit pursuant to R.C.M. 305(k) for a violation of R.C.M. 305(h) because the accused's commander failed to prepare a memorandum within seventy-two hours after imposition of confinement. Counting the first day of restriction, the military judge determined that the violation occurred on September 6, and that the accused was entitled to two days credit (September 6 and 7). For the purpose of calculating credit for restriction tantamount to confinement (*Mason* credit), however, the military judge excluded the first day and found the accused entitled to four days credit. The Army Court of Military Review agreed with the military judge's determination concerning R.C.M. 305(k) credit but, applying *DeLoatch*, held that the accused was entitled to five days credit, not four, for restriction tantamount to confinement.

As a result of these decisions, defense counsel are in a better position to urge that military judges apply the *DeLoatch* "first day-last day" rule in all confinement or restriction situations, whether calculating credit due pursuant to *Allen*, *Mason*, *Gregory*, R.C.M. 305(h) violations, or R.C.M. 305(i) violations. If successful, it will result in an additional day of credit not available under *New*. Additionally, in cases such as *Teeter*, the *DeLoatch* rule results in triggering the requirements of R.C.M. 305(h) and (i) one day earlier than *New*; the result may be an additional two days credit. Should the military judge decline to apply the *DeLoatch* rule, defense counsel should assert the client's entitlement to this credit to the convening authority in the post-trial submissions pursuant to R.C.M. 1105 and 1106. In this way, counsel can ensure that the client receives all possible credit due. Captain Timothy P. Riley.

---

[34] Comment, *Litigating Pretrial Confinement/Restriction Issues: New Counting is Now Old*, The Army Lawyer, Mar. 1988, at 26.

[35] 25 M.J. 718 (A.C.M.R. 1987).

[36] ACMR 8702028 (A.C.M.R. 30 Mar. 1988) (unpub.).

[37] ACMR 8800011 (A.C.M.R. 30 Mar. 1988) (unpub.).

[38] 25 M.J. at 719.

[39] *Id.* at 719 n.2.

[40] 23 M.J. 889 (A.C.M.R. 1987).

[41] More accurately, this was a *Gregory* credit for a violation of R.C.M. 305(i). *See* United States v. Gregory, 21 M.J. 952 (A.C.M.R.) (R.C.M. 305(k) credit accrues for periods of restriction tantamount to confinement), *aff'd*, 23 M.J. 246 (C.M.A. 1987) (summary disposition).

[42] 23 M.J. at 891.

[43] 25 M.J. 718 (A.C.M.R. 1987).

[44] *See* R.C.M. 305.

[45] *See* United States v. Allen, 17 M.J. 126 (C.M.A. 1984).

[46] ACMR 8800011 (A.C.M.R. 30 Mar. 1988) (unpub.).

Making Military Counsel "Available": Putting the Burden Where It Belongs

Captain Alan D. Chute
Camp Casey Field Office, U.S. Army Trial Defense Service

Introduction

Interrogating the suspect often produces a key piece of evidence in a criminal prosecution. If the suspect confesses to the crime, he completes the government's case against him; and if he makes only some incriminating admissions, he often supplies the glue to hold the government's case together. Since the Supreme Court decided *Miranda v. Arizona*,[1] the law has required investigators to follow a clearly established rights warning procedure to inform suspects of their fifth amendment rights. To ensure that suspects make only voluntary statements while undergoing custodial interrogation, the rights warning must include the right to remain silent and the right to consult with a lawyer.[2] Although the required rights warning is clear, the investigator's duties after the suspect invokes his rights were not so clear following *Miranda v. Arizona*.

This article focuses on the right-to-counsel aspect of the rights warning procedure, and in particular, the process of making counsel "available" to a suspect who has requested a lawyer. The article examines the manner in which the Army Court of Military Review has attempted to place the burden on the military suspect to make counsel available to himself. After reviewing the ambiguity resulting from the Supreme Court's use of the passive voice in *Miranda* and in *Edwards v. Arizona*,[3] the article concludes that it is really the government's burden to appoint a counsel to represent the suspect, and that the suspect's interrogators should not proceed with their questioning until the government has satisfied this duty. Finally, the article makes several suggestions for defense counsel to follow in making a proper record should this issue arise in future cases.

Invoking the Right to Counsel: Current Status

Rights Warning Procedures

The military investigator's rights warning obligations flow from *Miranda v. Arizona* and from the United States Court of Military Appeals case, *United States v. Tempia*.[4] In *Miranda*, the Supreme Court held that a suspect in custody "must be warned prior to any questioning . . . that he has the right to the presence of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires."[5] *Tempia* applied the *Miranda* ruling to military prosecutions.[6] Although the Court of Military Appeals originally held that only indigent service members were entitled to appointed counsel during interrogations,[7] it is now clear that the government must provide a military attorney for any military suspect at this stage of the process if the suspect requests a lawyer.[8] The effect of invoking the right to counsel under *Miranda* is straightforward: "[T]here can be no questioning . . . until [the suspect] has consulted with an attorney and thereafter consents to be questioned."[9]

In *Edwards v. Arizona* the Supreme Court held that, once a suspect has invoked his right to counsel, the authorities may not constitutionally re-advise him of his rights and obtain a waiver and subsequent statement.[10] The investigator may, however, obtain a statement under two circumstances: if the suspect initiates further conversation with the police; or if "counsel has been made available to" the suspect.[11]

Making Counsel "Available"

Although *Edwards* seems to provide a "bright line" rule, the requirement of making counsel "available" to the suspect leaves room for appellate court interpretation. The Army Court of Military Review, in the 1982 case, *United States v. Whitehouse*,[12] decided that the *Edwards* rule "requires only that the accused must be provided a 'reasonable opportunity' to consult with counsel."[13] and that the fifth amendment "interest is adequately protected by affording the accused the opportunity to seek counsel and exercise his prerogative as to whether he wishes to exercise his right to

[1] 384 U.S. 436 (1966).

[2] *Id.* at 244.

[3] 451 U.S. 477 (1981).

[4] 16 C.M.A. 629, 37 C.M.R. 249 (C.M.A. 1967).

[5] Miranda v. Arizona, 384 U.S. at 479.

[6] United States v. Tempia, 16 C.M.A. at 640, 37 C.M.R. at 260.

[7] *See* United States v. Hoffbauer, 5 M.J. 409 (C.M.A. 1978).

[8] Mil. R. Evid. 305(d)(2) provides that, when a service member requests an attorney, "a judge advocate . . . shall be provided by the United States at no expense to the person and without regard to the person's indigency or lack thereof before the interrogation may proceed."

[9] Miranda v. Arizona, 384 U.S. at 444. Mil. R. Evid. 305(e) also provides that, if a person requests counsel, "questioning must cease immediately."

[10] Edwards v. Arizona, 451 U.S. at 484.

[11] *Id.* at 484–85.

[12] 14 M.J. 643 (A.C.M.R. 1982).

[13] *Id.* at 645.

remain silent or to speak with the authorities."[14] In *Whitehouse*, the Army court concluded that an intervening period of thirteen days between rights warnings was an adequate time for the suspect to consult with counsel, and that the suspect's commander was permitted to interrogate him after this reasonable opportunity. The Army court later concluded in *United States v. Applewhite*[15] that a five day period between rights warnings was a reasonable opportunity for the suspect to consult with counsel.[16] Although the Court of Military Appeals disagreed with the Army court on the *Applewhite* facts,[17] there is no reported further appellate review of the *Whitehouse* decision.

One reason why *Edwards* has not resulted in a complete "bright line" rule is because the Supreme Court, in both *Miranda* and in *Edwards*, used the passive voice and awkward sentence construction in describing the government's fifth amendment obligations. In *Miranda*, the Court said, in emphasizing the right to counsel, that if the suspect is indigent he must be advised that "a lawyer will be appointed to represent him."[18] And, in *Edwards*, the Court merely said that counsel must be "made available"[19] to the suspect before interrogation may proceed. In neither case did the Court explicitly state who must provide this counsel and when the responsible party must provide this counsel. Thus, the Supreme Court incorporated into these two landmark holdings one of the classic faults of passive voice sentence construction: the actor's identity often is ambiguous.[20]

The Army's language in the actual rights warning perpetuates this ambiguity. When reading from the rights warning and waiver certificate, investigators advise a suspect of the right to counsel in the following terms: "This lawyer can be a civilian you arrange for at no expense to the Government or a military lawyer detailed for you at no expense to you, or both."[21] Although the rights warning clearly informs the suspect that he alone is responsible for obtaining a civilian counsel, this language does not inform the suspect who will actually appoint the military lawyer for him. Thus, the Army court apparently believed it was proper to place the responsibility of making counsel "available" on the shoulders of the accused by requiring him, within a reasonable time, to seek out the military lawyer that someone else is supposed to detail for him.

The Government's Burden to Provide Counsel

Looking Behind the Passive Voice

Contrary to the Army court's conclusions in *Whitehouse* and in *Applewhite*, a review of *Miranda* and subsequent military cases provides persuasive support for the view that it is the government's responsibility to provide counsel to the accused before any interrogation may continue. *Miranda* was clear in stating that, "if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present."[22] In a further explanation, the Supreme Court stated in *Miranda* that, when the suspect invokes the right to counsel, and "[i]f authorities conclude that they will not provide counsel during a reasonable period of time in which investigation in the field is carried out, they may refrain from doing so without violating the person's Fifth Amendment privilege so long as they do not question him during that time."[23] The Supreme Court cited with approval the F.B.I.'s procedure of advising suspects that their free counsel, if any, " 'will be assigned by the Judge.' "[24] Although the F.B.I. also used the passive voice, its agents at least informed the suspect of the person who would supply the free lawyer.

In *United States v. Tempia*,[25] the Court of Military Appeals envisioned that the government would satisfy *Miranda's* requirements by taking the initiative in appointing counsel for the suspect. In reference to the military's system of appointing military counsel for courts-martial, the court stated: "In most cases, a defense counsel will eventually have to be appointed for the trial. All that will now be required is that the date of appointment be moved back."[26] Even the dissenting judge in *Tempia* recognized that the military suspect shouldered no responsibility for arranging for his or her own legal advice under *Miranda* as applied to the military system. Although Judge Quinn was satisfied that the staff judge advocate could properly advise the suspect under the then-existing procedure, he referred to *Tempia's* new requirement of providing the

---

[14] *Id.* at 645–46.

[15] 20 M.J. 617 (A.C.M.R. 1985), *rev'd*, 23 M.J. 196 (C.M.A. 1987).

[16] *Id.* at 619.

[17] "[I]t cannot be said that appellant's failure to contact a lawyer during the 5 days between interrogations was unreasonable or indicative of a voluntary decision to forego the right to counsel previously invoked." United States v. Applewhite, 23 M.J. 196, 197 (C.M.A. 1987), *rev'g* 20 M.J. 617 (A.C.M.R. 1985).

[18] Miranda v. Arizona, 384 U.S. at 473.

[19] Edwards v. Arizona, 451 U.S. at 484–85.

[20] One law professor has written a book in which he cautions lawyers about writing sentences in the passive voice.

> [One] disadvantage of the passive voice is its potential for ambiguity. With the active voice, you can usually tell who is doing what to whom. With the passive voice, however, the writer can omit the identity of the actor. That kind of construction is called a "truncated passive." . . .
>
> Bureaucrats like the truncated passive because it cloaks the actor in fog—the reader cannot discover what flesh-and-blood person is responsible for the action.

R. Wydick, Plain English for Lawyers 28 (2d ed. 1985).

[21] Dep't of Army, Form No. 3881, Rights Warning Procedure/Waiver Certificate (Nov. 1984) [hereinafter DA Form 3881]. The quoted portion is on the reverse side of the form, and investigators read this language verbatim to suspects. The front side of the form contains the same language with the word "I" substituted for the word "you".

[22] Miranda v. Arizona, 384 U.S. at 474.

[23] *Id.*

[24] *Id.* at 484.

[25] 16 C.M.A. 629, 37 C.M.R. 249 (C.M.A. 1967).

[26] *Id.* at 629, 37 C.M.R. at 258.

military suspect with "a lawyer appointed through the efforts of the individual's interrogators."[27] Further, several subsequent military cases, after finding *Miranda* and *Tempia* violations, have criticized interrogators for asking further questions without arranging for legal counsel for the suspect.[28] The Army court's opinions in *Whitehouse* and in *Applewhite* appear to be the only reported cases in military jurisprudence in which the courts have held the accused responsible for arranging for his own legal counsel.[29]

Reasons for Placing the Burden on the Government

There are several reasons for holding the government responsible for placing the military suspect into contact with legal counsel prior to any subsequent interrogation. First, this position represents a "bright line" application of the *Edwards* rule. In determining whether a suspect has had a "reasonable opportunity" to consult with counsel, courts inevitably must resolve what period of time constitutes a reasonable opportunity. As evidenced by *Applewhite*,[30] appellate courts will disagree over what is reasonable when reviewing the same set of facts. In *Miranda*, the Supreme Court discouraged a rule that would result in after-the-fact determinations of whether a civilian could afford to provide his or her own counsel. While the Court recognized that only indigent civilians are entitled to appointed counsel, it nevertheless concluded that *all* suspects must be informed that they have the right to obtain appointed counsel if they cannot afford to pay for legal advice. The Court stated that "the expedient of giving a warning is too simple and the rights involved too important to engage in *ex post facto* inquiries into financial ability when there is any doubt at all on that score."[31] Likewise, the right to consult with counsel is too important to engage in subsequent debate over whether a military suspect has had a "reasonable opportunity" to consult with counsel. Military authorities can resolve all doubts during the investigation by taking steps to place the military suspect into contact with a military counsel.

Second, the principle that military justice is a command responsibility dictates that the suspect's commander ultimately bears responsibility for providing a counsel for the suspect who is a member of his command. In concluding that a commander violated a suspect's *Edwards* rights in *United States v. Reeves*,[32] the Army Court of Military Review stated that "it is a commander . . . who is primarily responsible for discipline, law, and order within his command."[33] In *United States v. Goodson*,[34] the Army court noted that the military interrogator violated an Army regulation by questioning the suspect after the suspect requested counsel, because the interrogator did not provide the suspect with "the location and telephone number of the nearest 'staff judge advocate.'"[35] This panel recognized that the interrogator bears some of the responsibility for initiating the suspect's contact with counsel. It seems that this responsibility could extend one step beyond the Army regulation by requiring the suspect's commander, even through the efforts of the military police interrogator, to arrange for an appointment between the suspect and the nearest military defense counsel. The Army regulation states that the suspect "must not be questioned until a lawyer is obtained,"[36] and that "[a]fter the accused or suspect has consulted his lawyer, [the interrogator] will arrange for further interview through the accused's or suspect's lawyer."[37]

Placing the responsibility on the government for providing counsel finds further support in the wording of the rights warning itself. In advising the suspect that his lawyer can be "a military lawyer detailed for you at no expense to you,"[38] the rights warning leads the suspect to conclude that he needs to take no action on his own to arrange for counsel, and that some other unidentified authority will arrange for the detail of counsel. It is not unreasonable for a military suspect, upon hearing this warning and asking for a lawyer in response to the investigator's inquiry, to leave the investigator's office, to return to his unit, and to wait for an appropriate official to appoint a counsel for him. Some may ask why the suspect took no additional action on his own to obtain a detailed counsel. The answer is that the

---

[27] *Id.* at 645, 37 C.M.R. at 265 (Quinn, J., dissenting).

[28] *See* United States v. Reeves, 20 M.J. 234, 235 (C.M.A. 1985) (investigator "made no effort to get an attorney for" the suspect); United States v. Harris, 19 M.J. 331, 333 (C.M.A. 1985) (investigator "had not tried himself to call for an attorney for" the suspect); United States v. Muldoon, 10 M.J. 254, 257 (C.M.A. 1981) ("the suspect specifically requested at the outset that he be provided with counsel and the investigator failed to comply with this request"); United States v. Goodson, 22 M.J. 947, 949 (A.C.M.R. 1986) (on remand from higher courts, criticized investigator for failing to comply with Army regulation that required investigator to give suspect the location and telephone number of the nearest staff judge advocate office); United States v. Spencer, 19 M.J. 677, 680 (A.F.C.M.R. 1984) ("no evidence that counsel had been made available to [suspect] since the time he requested it"); United States v. Alba, 18 M.J. 573, 574 (A.C.M.R. 1983) ("No effort was made to obtain counsel for" the suspect.).

[29] In United States v. Groh, 24 M.J. 767 (A.F.C.M.R. 1987), the Air Force court held that a statement was properly admitted into evidence, but the court reached this conclusion by finding that the appellant "initiated further discussion with the OSI by inquiring how long the investigation would take and whether it would be completed prior to the termination of his enlistment." *Id.* at 770. Although not necessary to support its holding, the court further stated that, in the eight days between rights warnings, counsel was "made available" to the appellant. The court quoted *Whitehouse* with approval, and relied heavily upon the fact that the agents originally gave the suspect the name and telephone number of the area defense counsel. *Id.* at 771.

[30] *See supra* notes 15–17 and accompanying text.

[31] Miranda v. Arizona, 384 U.S. at 473 n.43.

[32] 21 M.J. 768 (A.C.M.R. 1985) (on remand).

[33] *Id.* at 769 (emphasis removed).

[34] 22 M.J. 947 (A.C.M.R. 1986) (on remand).

[35] *Id.* at 949. The requirement is contained in Dep't of Army, Reg. No. 190–30, Military Police—Military Police Investigations, app. C, (1 June 1978) [hereinafter AR 190–30]. Although AR 190–30, by its own terms, applies only to military police investigators and not to Army Criminal Investigation Division (CID) agents, *see* AR 190–30, para. 1–2, other publications do apply to CID investigations. *See, e.g.*, Dep't of Army, Field Manual No. 19–20, Law Enforcement Investigations 58 (25 Nov. 1985) ("If the suspect says that he does [want a lawyer], stop the questioning until he has a lawyer.").

[36] AR 190–30, app. C, para. C–3*a*.

[37] *Id.*

[38] DA Form 3881.

suspect has already stated to someone in authority, in response to the interrogator's specific inquiry, that he does want a lawyer. When the suspect is called back to the interrogator's office for subsequent questioning, all the suspect knows is that the interrogator apparently has ignored his request for detailed counsel. A military suspect, unschooled in the technicalities of military justice and in the established procedures for detailing defense counsel, may conclude that he will not receive legal advice even if he requests counsel after a subsequent rights warning.

Providing Counsel Within the Existing Framework

In the Army, providing a military defense counsel for a military suspect is a relatively painless procedure for a commander or an interrogator to follow. By placing a telephone call to the local defense counsel's office, the commander or interrogator can easily arrange for proper legal advice for the soldier. Providing legal advice in this situation clearly is within the scope of the military defense counsel's duties,[39] and officers assigned to the U.S. Army Trial Defense Service are ready, willing, and able to provide advice. Since the law requires the military to appoint a counsel for the suspect, the law should also recognize the proper procedure for appointing defense counsel to represent suspects. Under Army regulations[40] and standard procedures,[41] the local senior defense counsel is the only authority at the typical military installation who is empowered to appoint officers of the Trial Defense Service to represent clients. Normally, if the soldier has an appointment at the Trial Defense Service office, he will meet with a consulting counsel, and in an appropriate case that attorney can arrange for the Senior Defense Counsel to detail the consulting counsel to the soldier's case on a continuing basis.

The alternative to this simple requirement is clear. As the Court of Military Appeals stated in *United States v. Tempia*, "[i]f the Government cannot comply with [the constitutional standards], it need only abandon its reliance in criminal cases on the accused's statements as evidence."[42] If there is any pain at all in requiring commanders and interrogators to arrange for legal counsel for suspects, it lies only in the concern that the suspect may not make any further statements to the authorities after the suspect receives proper legal counsel. This is a small price for the military justice system to pay in its effort to safeguard a soldier's constitutional rights. If the suspect declines to confess to the authorities after he consults with a properly appointed legal counsel, the prosecution simply will be required to prove its case without the accused's assistance.

Suggestions for Defense Counsel

In cases in which the accused has waived his rights and made a statement after a previous request for an attorney, the defense counsel should make a motion to suppress the statement on the grounds of denial of the accused's fifth amendment right to counsel. The outcome, of course, will depend upon the facts of the particular case and upon the law that the military judge will apply.

Initially, the defense counsel could attempt to persuade the military judge that the military appellate courts have incorrectly interpreted *Edwards v. Arizona* and have wrongly placed the burden upon the suspect to obtain his own appointed counsel. The defense counsel would argue that, as the investigator took no action to obtain counsel for the suspect, any statement made after a subsequent rights warning and interrogation should be suppressed.

If the military judge applies *Whitehouse*, the defense counsel must be prepared to show that counsel was not "made available" to the accused and that the accused did not have a "reasonable opportunity" to obtain an appointed counsel. To do this, the defense counsel must make a record in court of the facts, either through witnesses and documents, or through a stipulation with the trial counsel.

The evidence in support of the defense position will fall into several categories. First, the defense counsel should offer evidence of the date and time of the original request for an attorney, and the date and time of the subsequent rights warning. If some of the intervening days were weekends, holidays, or other non-duty days, the defense counsel should ensure that this information is recorded in the court-martial record. Second, the defense counsel can present information concerning the client's duty status during the intervening days. For example, if the client was performing duties as Charge of Quarters, was in the field, or was performing some other military duty that made it difficult for him to see an attorney, his duty status may affect whether he had a "reasonable opportunity" to seek legal advice. Third, the defense can present, through the client's testimony, whether the client knew how to obtain a lawyer or whether the client believed that some military authority would appoint a lawyer for him. Finally, the defense can present evidence from the senior defense counsel or from some other person associated with the local Trial Defense Service office regarding the operations of the local office. This information would include the operating hours, the procedure for making client appointments, and the procedure for detailing counsel to specific cases. Some of this information will assist the military judge in determining whether the client had a "reasonable opportunity" to obtain counsel, and some will be helpful for appellate review in determining who has the burden of providing counsel for military suspects.

Conclusion

By using the passive voice in prescribing the government's obligations in *Miranda v. Arizona* and in *Edwards v. Arizona*, the Supreme Court failed to make clear the "bright line" obligation to provide legal counsel for a suspect. Although the military suspect is entitled to free legal counsel without regard to indigency, the Army Court of Military Review took advantage of the resulting ambiguity by requiring the military suspect to seek out his own military

[39] Counseling suspects in accordance with *Miranda* is a "Priority II" duty for Army defense counsel. *See* Dep't of Army, U.S. Army Trial Defense Service Standard Operating Procedures, para. 1–5b(1) (1 Oct. 1985) [hereinafter USATDS SOP].

[40] Dep't of Army, Reg. No. 27–10, Legal Services—Military Justice, para. 6–9 (18 Mar. 1988) (granting to Chief, U.S. Army Trial Defense Service, the authority to detail counsel to military cases).

[41] USATDS SOP, para. 3–7a (Chief, USATDS, delegates to local Senior Defense Counsel the authority to detail counsel).

[42] United States v. Tempia, 16 C.M.A. at 640, 37 C.M.R. at 260.

defense counsel, as long as the suspect has a "reasonable opportunity" to do so. The Army court's analysis necessarily results in after-the-fact determinations of whether the time period between rights warnings constitutes a reasonable opportunity. By placing the burden of providing legal counsel on the commander or interrogator, military courts can avoid uncertainty and focus, not on the accused's efforts to obtain a detailed military defense counsel, but rather on whether the government has accomplished its duty by providing the suspect with a properly appointed defense counsel.

Time Is of the Essence: Defense Counsel's Guide To Speedy Trial Motions

Captain Thomas W. Dworschak
*Office of the Staff Judge Advocate, Fort McPherson, Georgia**

Introduction

Once a soldier is charged under the Uniform Code of Military Justice, the defense counsel faces a plethora of decisions: the plea, the forum, the testimony of the accused, and a wealth of other tactical choices. Perhaps paramount to the defense case are the pretrial motions, which a crafty defense counsel can use to shape the upcoming judicial battlefield. The speedy trial motion is one seldom employed by the defense, because it requires a government delay before it springs to life; but, precisely because it is relatively rare, many counsel are unfamiliar with some speedy trial issues.

The Mechanics of the Running of the Clock

RCM 707 spells out the standards imposed upon the government to bring a case to court martial. In essence, a soldier must be tried either within 120 days of notice of preferral of charges, or within 120 days of restriction in lieu of arrest, arrest, or confinement, whichever is earlier.[1] If there is arrest, confinement, or conditions tantamount to confinement,[2] then the soldier must be tried within 90 days of its imposition.[3] A speedy trial violation may occur in less than 90 days if the accused demands an immediate trial.[4] The military judge may, upon a showing of extraordinary circumstances, extend the 90-day limit by ten days.[5] Once the clock begins to run, it may be reset to zero only if the charges are dismissed, a mistrial is granted, or the accused is released from pretrial restraint for a significant period of time.[6]

Defense counsel must raise the speedy trial motion prior to final adjournment of the court or the motion is waived.[7] A plea of guilty does not waive a properly raised speedy trial issue on appeal, however.[8] Once the issue is raised, the government must prove by a preponderance of the evidence that the accused's speedy trial rights have not been violated;[9] the accused need not show that he has suffered prejudice as a result of the delay. Failure of the government to meet its burden can have only one remedy: dismissal of the charge with prejudice.[10] As this is a termination of the proceedings, the government may appeal.[11]

In calculating the elapsed government time, the day of notice of preferral or the day pretrial restraint is imposed is not counted, but the day of trial is counted.[12] The running of the clock terminates either when a plea of guilty is entered or evidence is presented on the merits.[13] In cases where there are multiple charges, with different dates of preferral, there may be several different speedy trial clocks in motion;[14] when pretrial restraint is involved, however "government accountability [for subsequent charges] . . . begins on the date the government had in its possession substantial information on which to base preferral of that charge,"[15] which may be before the date of preferral.

---

*Formerly assigned to the Camp Casey Field Office, U.S. Army Trial Defense Service.

[1] Manual for Courts-Martial, United States, 1984, rule for Courts-martial 707(a) [hereinafter R.C.M.]. *See generally* Wittmayer, *Rule for Courts-Martial 707: The 1984 Manual for Courts-Martial Speedy Trial Rule*, 116 Mil. L.Rev. 221 (1987).

[2] *See* United States v. Acireno, 15 M.J. 570, 572 (A.C.M.R. 1982).

[3] R.C.M. 707(d).

[4] *See* R.C.M. 707(d) discussion; United States v. Johnson, 1 M.J. 101, 106 (C.M.A. 1975).

[5] R.C.M. 707(d).

[6] R.C.M. 707(b)(2).

[7] R.C.M. 907(b)(2)(a).

[8] *See* United States v. McDowell, 19 M.J. 937 (A.C.M.R. 1985) (conviction pursuant to guilty plea set aside because of denial of speedy trial) [ed. note: A proposed change to the Manual would provide that a guilty plea waives any speedy trial issue].

[9] R.C.M. 905(c)(2)(B).

[10] R.C.M. 707(e).

[11] R.C.M. 908.

[12] R.C.M. 707(b)(1).

[13] R.C.M. 707(b)(3).

[14] R.C.M. 707(b)(4).

[15] United States v. Boden, 21 M.J. 916, 918 (A.C.M.R. 1986).

Construing the Exceptions of Rule 707(c)

For the trial practitioner, the key to any speedy trial motion lies in Rule for Courts-Martial 707c. The time constraints outlined above are not calculated merely by looking at the calendar; instead, the accused's speedy trial right is violated only if more than 90 or 120 days of government accountable time have elapsed. RCM 707c specifies days that are not charged to the government. Defense counsel's ability to prevent the trial counsel from successfully placing any periods of time into one of RCM 707(c)'s exceptions will dictate the success of the motion. One basic concept must be kept in mind: if the time does not fall into one of these enumerated categories, by definition it is government accountable time. By the same token "[an] accused and his counsel need not do anything to speed his case to trial. The obligation to proceed with dispatch is solely that of the Govenment and the obligation is especially heavy when an accused is in pretrial confinement."[16]

Several of the provisions of rule 707(c) are self-explanatory. When the trial on the merits is delayed by certain collateral proceedings, the resulting delay is not charged to the government. Rule 707(c)(1) lists five such proceedings: the mental examination of the accused; hearings pertaining to the accused's mental capacity; pretrial motion sessions; non-frivolous government appeals; and petitions for extraordinary relief. In addition, the government will not be responsible for any delays in the court-martial due to the unavailability of the military judge because of extraordinary circumstances,[17] failure by the defense to provide notice or submit matters as required by the Manual for Courts-Martial,[18] the absence of the accused,[19] and, in some cases, coordination for joint trials.[20] The rule also excludes from government accountability delays in the article 32 investigation, or in the trial itself, that result because of the absence of substantial evidence despite due diligence, or because of the need for additional preparation time due to exceptional circumstances of the case.[21] This last provision, however, requires that the delay in these instances must be at the request of the prosecution. Therefore, trial counsel will be unsuccessful if he or she tries to use this exception on the day the defense counsel brings the speedy trial motion.

The two remaining categories, however, are less clear-cut and occur far more frequently, and therefore are of much greater interest to the practitioner. These categories are delay at the request or consent of the defense,[22] or other periods of "good cause."[23]

"Request or Consent of the Defense"

Probably the most used category is delay due to the request or consent of the defense. In defining defense requested delay, counsel should realize that the court will look beyond mere labels, even if the delay was specifically requested by the defense:

> [S]imply labeling a delay as defense requested does not always end the exercise. . . . Rather, sometimes it is necessary to look behind which party physically requested the delay to ascertain to whose benefit the delay in fact accrued. If the Government was not prepared to proceed with the prosecution of the case, and was not adversely affected by the delay in proceeding with its preparation for trial, . . . the status of the defense case is irrelevant for purposes of speedy trial, for no "delay" actually resulted from the defense request.[24]

The implications of this proposition are wideranging. Because the request for delay must actually result in a delay in the trial, even if there is a written request for defense delay the time will be charged against the government unless the government can show that the request actually resulted in a delay in the proceedings. The defense should strive to demonstrate that the government could not have proceeded during the period of alleged defense delay, due to the unavailability of witnesses or other evidence. In addition, the staff judge advocate's weekly status reports can show when the case was docketed, and also shed light on when the government was able to proceed.

In some instances, the absence of the defense counsel may also not be defense delay. The Army Court of Military Review has held that, unless the absence of the defense counsel was solely for the convenience or benefit of the accused, the time is still charged to the government.[25] Therefore, when a defense counsel was absent for two weeks temporary duty (TDY) to attend a CLE course at The Judge Advocate General's School, this period was not solely for the convenience or benefit of the accused, because "[t]he final decision on whether this officer attended the course of instruction remained with the government."[26] Applying the same rationale, the court went on to explain that even the three days' leave the counsel took in conjunction with the TDY was not defense delay.[27]

The government may also attempt to pin responsibility for delay on the defense under the second half of rule 707(c)3 by arguing that, although the defense did not specifically request the delay, the defense consented to the delay. Case law has consistently held that this is a narrow

---

[16] United States v. McClain, 1 M.J. 60, 64 (C.M.A. 1975).

[17] R.C.M. 707(c)(2).

[18] R.C.M. 707(c)(4).

[19] R.C.M. 707(c)(6).

[20] R.C.M. 707(c)(7).

[21] R.C.M. 707(c)(5).

[22] R.C.M. 707(c)(3).

[23] R.C.M. 707(c)(8).

[24] United States v. Cole, 3 M.J. 220, 225 (C.M.A. 1975).

[25] United States v. Powell, 2 M.J. 849, 853 (A.C.M.R. 1976).

[26] *Id.* at 853.

[27] *Id.*

exclusion. A busy jurisdiction will not relieve the government from responsibility for delay, for "[d]ocketing delays are generally attributable to the Government."[28] A government pronouncement that it is ready to proceed on a specific date does not trigger a defense delay if a later date is eventually decided upon, even if the later date is actually selected by the defense.[29] The Court of Military Appeals has further held that, once the government places the case on the docket, "mere defense acquiescence in a trial date is not the equivalent of a request for continuance which would relieve the government of its accountability."[30]

Appellate courts have made it clear that the time required to perform the routine preparations for trial are chargeable to the government. For example, when the government complained that passport difficulties were responsible for the delay in a court-martial, the Court of Military Appeals wrote that "[a]ssuring the presence of witnesses for trial is one of the routine responsibilities of the prosecution for which ample time allowance was made in establishing the 90-day standard."[31] This situation must be distinguished, however, from instances in which the defense requests "extraordinary items not necessary to the [Article 32] investigation"; in this instance the delay is chargeable to the defense.[32] The time required to process a Chapter 10 request by the accused is not charged to the defense, for this is "only another incident of the normal processes of military justice."[33] Pretrial negotiations, even if they last nearly two months, are not "regarded as an 'implied' request or consent to [defense] delay."[34]

"Good Cause"

Finally, rule 707(c)(9) allows the government to exclude from its accountable time "[a]ny other period of delay for good cause, including unusual operational requirements and military exigencies." In interpreting this rule, the Navy and Army Courts of Military Review looked to the legislative history of rule 707 and ruled that good cause is "a less strict standard than 'extraordinary circumstances' required by RCM 707(d)."[35] In defining good cause, the courts have employed a balancing test in which "[t]he interest of the accused and the military in a speedy trial must be weighed against the ends of justice that may be served by a delay in trial."[36] Even if the government can show that the event was of the type that satisfies the good cause balancing test, the Courts of Military Review have posed a second requirement: "whether a nexus exists between the event and any delay in trial."[37]

These tests are by design undefined and flexible, for "[t]he good cause exclusion is manifestly not a straight jacket for the government or a tool for the oppression of the accused. . . . It is a rule of balance, common sense and reason to be realistically applied in its military setting".[38]

Conclusion

This article has explained some of the central concepts of the 1984 Manual for Courts-Martial speedy trial rule. The rule prescribes the maximum number of days allowed for pretrial processing, but several exceptions can expand the maximum number of days. By maintaining a firm understanding of what falls within these exceptions, defense counsel will be better prepared to litigate speedy trial motions.

---

[28] United States v. Burris, 21 M.J. 140, 144 (C.M.A. 1985). The Court of Military Appeals has held that in almost every instance the government will be responsible for all delays. United States v. Carisle, 25 M.J. 426 (C.M.A. 1988).

[29] United States v. White, 22 M.J. 631, 634 (N.M.C.M.R. 1986).

[30] United States v. Wolzok, 1 M.J. 125, 128 (C.M.A. 1975).

[31] United States v. Dinkins, 1 M.J. 185, 186 (C.M.A. 1975).

[32] United States v. Freeman, 23 M.J. 531, 535 (A.C.M.R. 1986); *see also* United States v. Bean, 13 M.J. 970, 972 (A.C.M.R. 1982).

[33] United States v. O'Brien, 48 C.M.R. 42, 46 (C.M.A. 1973); *see also* United States v. Harris, 20 M.J. 795, 797 (N.M.C.M.R. 1985).

[34] United States v. Harris, 20 M.J. at 796.

[35] United States v. Lilly, 22 M.J. 620, 625 (N.M.C.M.R. 1986) (quoting United States v. Durr, 21 M.J. 576, 578 (A.C.M.R. 1985)). The Air Force Court of Military Review takes a much more restrictive view of good cause, however, citing the language in the rule that mentions "*unusual* operational requirements and military *exigencies*." United States v. Miniclier, 23 M.J. 843, 847 (A.F.C.M.R. 1987) (emphasis in original).

[36] United States v. Lilly, 22 M.J. at 625 (quoting United States v. Durr, 21 M.J. at 578.

[37] *Id.* at 626 (quoting United States v. Durr, 21 M.J. at 578).

[38] *Id.*

Military Rule of Evidence 410: The Pitfalls of Plea Negotiations

Captain William H. Ibbotson
Senior Defense Counsel, 1st Cavalry Division Field Office
U.S. Army Trial Defense Service

Military Rule of Evidence 410 (hereinafter Rule 410) is an exclusionary rule based on Federal Rule of Criminal Procedure 11 and Federal Rule of Evidence 410 (hereinafter Federal Rule 410). It protects withdrawn pleas of guilty, admissions during plea discussions and statements during the providence inquiry from later use by the government against the accused.[1] This type of evidence is one of the most powerful available to the government and its use can be devastating. The following anecdote from a British barrister makes the point rather clearly:

> I had been briefed to defend a man on a charge of horsestealing; and, as briefs were scarce, I had no idea of letting the case go without a fight. As chance would have it, the prisoner was arraigned during the luncheon hour when I had left the court, and I was disgusted to find on return that he had actually pleaded "Guilty." I at once sought the judge, and asked him privately to let the plea be withdrawn, explaining to him my position, and assuring him that had I been in court, I should have advised the prisoner differently. The learned Baron demurred at first, but seeing my earnestness he gave way, and the prisoner was permitted to withdraw his plea. The trial came on; and after I had addressed the jury with much fervor, the learned Baron proceeded to sum up as follows: "Gentlemen of the jury, the prisoner at bar is indicted for stealing a horse. To this charge he has pleaded guilty; but the learned counsel is convinced this was a mistake. The question therefore, is one for you, gentlemen, which of them you will believe. If you have any doubt, pray bear in mind that the prisoner was there and the learned counsel wasn't.[2]

The purpose behind Rule 410 is to "encourage the flow of information during the plea bargaining process and the resolution of criminal charges without 'full scale' trials."[3] The reasons given for Federal Rule 410 are similar. On the one hand, it encourages free dialogue between the accused and government representatives during plea negotiations, and on the other, it protects any statements made in the course of this process from use against an accused, to include impeachment.[4] Without this blanket of protection it would be impossible to conduct the plea bargaining process in any reasonable manner.

This article examines the scope and nature of plea discussions with particular attention to the following: what characterizes a discussion as protected under Rule 410; when discussions start and terminate; who may conduct the discussions for an accused and for the government; and whether other people may act as government representatives for plea discussions under an agency theory. The purpose is to acquaint counsel with the limits of protected plea discussions and possible pitfalls for the unwary.

Rule 410 cannot be viewed in isolation. It is only one of a number of exclusionary rules that may affect the admissibility of a statement. Among these rules are the fifth and sixth amendments, Article 31 of the Uniform Code of Military Justice, and Military Rule of Evidence 403. Counsel seeking to exclude a statement on the basis of Rule 410 should consider urging exclusion on these or other possible bases as well.

What Is "Any Statement Made in the Course of Plea Discussion"?

The phrase "any statement made in the course of plea discussions" is used in both Rule 410 and Federal Rule 410. For this reason, federal cases are persuasive authority in this area, absent an allowance for some unique aspect of military practice. One allowance for military practice within the text of Rule 410 bears mention now.

Rule 410(b) defines the phrase "statement made in the course of plea discussions" to include a request for administrative discharge in lieu of trial. This is sensible because in court-martial cases administrative solutions to criminal charges are a frequent product of pretrial negotiations. It is also a necessary extension of the rule because an accused is required to sign a form admitting to guilt as part of any request for separation in lieu of court-martial.[5]

Who May Speak for the Accused?

An accused or suspect may speak for himself in plea discussions or conduct the discussion through his attorney. Though seeking the services of an attorney is almost always a good idea, the use of an attorney in discussions with government representatives does not affect whether the discussion is a plea discussion under Rule 410. In *United States v. Babat*,[6] a suspect negotiated for immunity with a Criminal Investigation Division (CID) agent through her attorney. The court, in admitting the attorney's statements at trial, focused on the nature of the discussion as a bargain for immunity rather than a plea discussion. The fact that the negotiator was an attorney did not affect the decision.[7]

---

[1] Mil. R. Evid. 410. *But see* United States v. Holt, 22 M.J. 553 (A.C.M.R. 1986), *petition granted*, 23 M.J. 358 (C.M.A. 1987) (If guilty plea is accepted, statement made during providence inquiry may be used during sentencing proceeding to help determine an appropriate sentence).

[2] A.C. Plowden, Grain or Chaff: The Autobiography of a Police Magistrate, at 156 (1903); quoted in 2 Weinstein's Evidence § 410[03], at 410–28 (1980).

[3] United States v. Barunas, 23 M.J. 71, 76 (C.M.A. 1986).

[4] United States v. Robertson, 582 F.2d 1356, 1366 (5th Cir. 1978) (en banc).

[5] Dep't of Army, Reg. No. 635–200, Personnel Separations-Enlisted Personnel, figure 10–1 (5 July 1984).

[6] 18 M.J. 316 (C.M.A. 1984).

[7] *Id.* at 326. *Babat* was tried before the Military Rules of Evidence took effect. The court noted, however, that Babat's attorney was not engaged in "plea negotiations" because there was no reasonable expectation that the attorney could negotiate a plea at the time of the discussion.

A more complicated situation arises when there are several suspects or accused persons participating in a discussion together. Rule 410 protects any accused who was "a participant in the plea discussions." It is sometimes hard, however, to tell what each individual's intentions and expectations are, especially when one accused does most of the talking.[8] As a result it is hard to analyze whether the incriminating statements by each individual are protected. A further complication is that the participants often have adverse interests. Beyond the problems under Rule 410, the use of one accused's statement against another raises difficult Confrontation Clause issues.[9]

When do Plea Discussions Start?

Preferral of charges is a factor in deciding whether a discussion is a protected plea negotiation. In federal practice filing charges creates an inference that subsequent discussions with prosecutors are protected.[10] This is a reasonable approach; courts find it easier to believe a defendant's purpose was to negotiate a plea when the charges are extant.[11] Whether charges are pending is not, however, dispositive.[12] Moreover, preferral of charges may not be as critical a factor in military practice as filing is in federal courts.

The military defense counsel routinely sees clients who are being investigated for offenses or have charges preferred against them. The counsel often talks to the prosecutors and chain of command in an effort to "talk down" disposition of the offense to the lowest level possible. Sometimes a case that might reasonably result in a special court-martial can be routed to a nonjudicial punishment proceeding, letter of reprimand, or another alternative to judicial action. This is an accepted and routine function for the defense counsel. To impede this process by making such negotiations admissible evidence is unfair and counterproductive. To be safe under such a rule, the defense counsel would have to wait until the charges were referred before negotiating on behalf of the client.

Looking at Rule 410(b), it is clear that the military version of this rule was intended to extend beyond the limits of Federal Rule 410. This view is confirmed by the Court of Military Appeals in the case of *United States v. Barunas.*[13] In this case a Navy Lieutenant was caught possessing and using illegal drugs. In a letter he pleaded with the commander of his ship to take some action other than court-martial.[14] The court, in ruling the letter inadmissible, noted that Rule 410 is an "expanded version" of Federal Rule 410.[15] The court discouraged an "excessively formalistic or technical approach" to Rule 410, because it would undermine the two purposes behind the rule: increasing the flow of information and avoiding "full scale" trials.[16]

Different policy considerations may come into play, however, when the discussion occurs in the early investigative stages of a case. Federal Rule 410 was amended in 1980 to clearly separate investigative and prosecutorial functions. This change was made to deny protection under Federal Rule 410 to discussions with investigators.[17] This one area where the federal and the military rules differ slightly, although the intent is the same. Military Rule 410 uses the phrase "with the convening authority, staff judge advocate, trial counsel or other counsel for the Government."[18] Federal Rule 410, in comparison, uses the more restrictive phrase "with an attorney for the prosecuting authority."[19] Sometimes military commanders function as both investigators and convening authorities, and their role in the early stages of a case may not be clear. Also, certain cases are not investigated by the Military Police or the Criminal Investigation Division, but by the unit itself.[20] The Manual for Courts-Martial authorizes commanders to investigate criminal allegations as a prelude to the disposition of charges.[21]

Finally, you have those situations that start out with a view toward administrative action and develop into a criminal proceeding over time. The defense counsel who negotiates for a client in such cases could find his admissions, incident to the discussion of a conditional waiver of board rights, a letter of reprimand, or a nonjudicial punishment action, admitted at his client's court-martial. To place these discussions outside Rule 410 because the case is still in the investigative phase or because a commander may not be the convening authority of any court-martial later referred, is at odds with the expanded nature and purpose of Rule 410 announced by the Court of Military Appeals in *Barunas.*[22]

---

[8] *See* United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978) (en banc).

[9] *See* Lee v. Illinois, 106 S. Ct. 2056 (1986); Burton v. United States, 391 U.S. 123 (1968) (The government may not introduce extrajudicial statements of a co-accused unless they are purged of references to the accused, the maker is subject to cross-examination, or the accused's confession interlocks with the co-accused's statement.)

[10] 2 Weinstein's Evidence *supra* note 1, § 410[08], at 410–53.

[11] United States v. Sebetich, 776 F.2d 412, 421–22 (3d Cir. 1985).

[12] United States v. Grant, 622 F.2d 308 (8th Cir. 1980).

[13] 23 M.J. 71 (C.M.A. 1986).

[14] *Id.* at 73–74.

[15] *Id.* at 75.

[16] *Id.* at 76.

[17] 2 Weinstein's Evidence, *supra* note 1, § 410[08] at 410–46 to 410–48.

[18] Mil. R. Evid. 410(a)(4).

[19] Fed. R. Evid. 410(4).

[20] Dep't of Army, Reg. No. 190–30, Military Police—Military Police Investigations, para. 3–17*f* (I01 29 Nov. 1984) (Smaller dollar amount larceny cases will be investigated by the unit of the victim, not by MPI or CID.).

[21] Manual for Courts-Martial, United States, 1984, Rule for Court-Martial 303 [hereinafter R.C.M.]; R.C.M. 405.

[22] *See supra* notes 12–15.

When do Plea Discussions Terminate?

When plea discussions end, Rule 410 no longer provides protection. In this area the federal cases give firm guidance. First, look at when a deal is made. Statements following the conclusion of the bargain are usually unprotected. For example, grand jury testimony given as part of a defendant's performance under a concluded plea bargain is not protected and may be used against a defendant who withdraws from the deal.[23] Withdrawing from the deal is not the only way to run into trouble, however. Renegotiation also holds some hazards.

Once you have a pretrial agreement, any attempt to negotiate a better deal may be unprotected. In *United States v. Grant*[24] a county judge in Arkansas was investigated for his involvement in a kickback scheme. The defendant struck a deal that allowed him to plead to a one-count indictment in return for his cooperation with the government.[25] The defendant subsequently tried to negotiate a refinement of the deal that would allow him to avoid jail and pay a substantial fine instead. This discussion was unprotected.[26]

Rule 410 should operate the same way in the military context as in federal practice. The only variant is that under military law there are more players in the negotiation process. Prosecutors make all the deals in federal courts, but a military case has a number of potential convening authorities, in addition to the staff judge advocate and his staff of attorneys, all with input in a pretrial agreement. For example, an agreement with a special court-martial convening authority to dispose of a case at his level does not preclude a higher convening authority from assuming control of the case and referring it to a higher court. The defense in this situation should not be penalized for negotiating with other convening authorities or lower commanders in an attempt to orchestrate the most advantageous deal for his client. To hold otherwise would limit the defense counsel's ability to negotiate until after a case was referred by a specific convening authority. Even with these strong policy arguments, the language used in Rule 410 creates a problem for defense counsel.

Prior to referral a defense counsel cannot be certain who the convening authority is for protection under Rule 410. Beyond this problem, discussions with company and battalion commanders are particularly risky because they cannot, in most cases, convene a court-martial. Denying the defense access to these key individuals in pretrial discussions by making the defense deal with them absent protection under Rule 410, is unfair and counterproductive. This is particularly true in commands where each subordinate commander must endorse a pretrial agreement before approval by the convening authority.

What is a Plea Discussion?

The first step in analyzing the nature of a plea discussion is to establish a working definition of the term. The Second Circuit, in *United States v. Levy*,[27] appears to have developed a clear and succinct one:

> Plea bargaining implies an offer to plead guilty upon condition. The offer by the defense, must, in some way, express the hope that a concession to reduce punishment will come to pass. A silent hope, if uncommunicated, gives the officer or prosecutor no chance to reject a confession he did not seek. A contrary rule would permit the accused to grant retrospectively to himself what is akin to use immunity. Even statements made voluntarily after *Miranda* warnings would later be objected to on the purported grounds that they were made in anticipation of a guilty plea since reconsidered.[28]

This definition provides important guidance on what constitutes a plea discussion, but does not provide a test or method of analysis. Using this definition we can, however, exclude certain statements from this category.

What is not Included in Plea Discussions?

Three types of statements clearly fall outside the limits of a plea discussion: confessions, bargains for immunity, and bargains for the benefit of a third party. Confessions are merely the relation to another of facts that show you are guilty of a crime. This type of statement lacks the quid pro quo that is the essence of a plea bargaining process.[29] Unless there is an admission of guilt given by the defendant in expectation of a limitation of punishment, the circumstances do not meet the definition.

A bargain for immunity fails to meet the definition for much the same reason as a confession does. Immunity is not the same as a sentence limitation or other traditional object of a plea negotiation, so Rule 410 does not protect admissions incident to this sort of bargaining process.[30]

Bargaining for the benefit of a third party is also unprotected because the benefit in a plea bargain runs to the defendant, not some other person. For this reason a statement such as "I'll confess if you promise to keep my wife out of jail," would, arguably, not be protected under Rule 410.[31] This makes sense in light of the distinction between bargaining for immunity and plea bargaining, as the object of the defendant's bargain is something other than a limitation on his sentence. This discussion of what fails to constitute a plea bargain shows the importance of establishing a clear framework for analysis in this area.

---

[23] United States v. Stirling, 571 F.2d 708, 731 (2d Cir.), *cert. denied*, 439 U.S. 824 (1978).

[24] 622 F.2d 308 (8th Cir. 1980).

[25] *Id.* at 310.

[26] *Id.* at 315.

[27] 578 F.2d 896 (2d Cir. 1978).

[28] *Id.* at 901.

[29] United States v. Robertson, 582 F.2d 1356, 1368-69 (5th Cir. 1978) (en banc).

[30] United States v. Babat, 18 M.J. 316, 321 (C.M.A. 1984).

[31] *See Robertson*, 582 F.2d at 1370.

What Tests do the Federal Courts use to Decide Whether a Statement is a Plea Discussion?

Federal cases hold that any discussions on plea or sentence limitations initiated by government representatives will be covered by Rule 410 absent highly unusual circumstances.[32] This makes sense because the most difficult and critical element in analyzing cases in this area is dealing with the defendant's subjective intent and expectations. Where the government makes the initial representations, there is no problem holding that the defendant had a reasonable expectation that a plea discussion was in progress. In most cases, however, the situation is not so simple.

The leading federal case in this area is a case from the Fifth Circuit: *United States v. Robertson.*[33] In *Robertson,* agents of the Drug Enforcement Agency (DEA) searched a private home and found two men and two women in the house. The agents also found chemicals used in the manufacture of methamphetamines. After all the suspects had been transported to the DEA office for processing and arraignment, the two men, Robertson and Butigan, talked with the agents in the parking lot. Butigan stated that he wanted to tell everything if it would help his wife. The DEA agents promised nothing but said cooperation would probably help. Butigan then talked to Robertson. Following the conversation both men indicated that they wanted to talk to help the women. In the discussion that followed Butigan outlined the criminal enterprise. Robertson said only a few things, but seemed to acquiesce and agree with what Butigan was saying.[34]

To determine whether this discussion was protected by Federal Rule 410, the Fifth Circuit conducted a two-tiered analysis.[35] First, the court looked for an actual subjective expectation on the part of the defendant to negotiate a plea. Second, the court examined all the surrounding circumstances to determine if this subjective expectation was reasonable.[36] The first tier of analysis supports the purpose behind Federal Rule 410 to give an incentive for a "free plea dialogue," while the second tier avoids abuse of this protection by a self-serving defendant.[37] Using this test the court found that Butigan and Robertson failed to meet the first part of the test.[38] The court found no subjective intent to negotiate a plea, only to confess in an attempt to sway the government to not prosecute the women.[39] There was not, as mentioned earlier, the requisite quid pro quo for a plea negotiation.

While the *Robertson* test supports the purpose behind Rule 410, and, from a purely analytical standpoint, provides a fair result, there are two problems. First, the test is fact-specific; thus courts must use a case-by-case approach. Second, the issues are tied to facts that are impossible to clarify: subjective expectations and the reasonable nature of such expectations. Without a "bright line rule" this test is susceptable to abuse by defendants claiming a subjective intent and difficult to apply with consistency and fairness.

One court has proposed a "bright line rule" that would avoid some of the difficulties inherent in the *Robertson* approach. In *United States v. Washington*[40] the District Court for the Eastern District of Pennsylvania proposed placing an affirmative duty on the government to state whether a given discussion was a plea negotiation under Federal Rule 410.[41] Failure on the part of government representatives to notify the defense of the nature of a discussion would result in a judicial presumption of inadmissibility under Federal Rule 410.[42] This approach, similar in nature to the *Miranda* warnings, would avoid the difficulties inherent in the *Robertson* analysis. The problem with such a test, however, is the frequency with which it might protect statements not otherwise entitled to protection simply because of a negligent failure by police to warn. To date, this "bright line" approach has not gained acceptance.

What Tests do Military Courts use to Decide if a Statement is a Plea Discussion?

The Court of Military Appeals has not yet established a clear test to determine when a "plea discussion" occurs. Some points, however, are settled enough for discussion; and there is room for advocacy to make a difference in future cases on this issue.

The Court of Military Appeals used the *Robertson* approach in *United States v. Babat.*[43] Rule 410 was not in force at the time of this decision so the precedential value of the case is marginal. In its only "post-rules" case on the issue, *United States v. Barunas,*[44] the court does not refer to *Robertson* at all and appears to go beyond the limits of the test used in *Robertson.* In *Barunas,* a Navy Lieutenant pleaded with his commander for some disposition other than a court-martial to atone for his drug-related misconduct. Under a strict *Robertson* analysis this is not a plea bargain, because the accused did not offer anything, only begged for mercy.[45] Further, the accused noted in the letter that his statements could be used against him, thus eliminating any subjective belief that the statements were

---

[32] *Grant,* 622 F.2d at 314.

[33] 582 F.2d 1356 (5th Cir. 1978) (en banc).

[34] *Id.* at 1360–61.

[35] *Id.* at 1366.

[36] *Id.*

[37] *Id.*

[38] *Id.* at 1368.

[39] *Id.* at 1369.

[40] 614 F. Supp. 144 (E.D. Pa. 1985), *aff'd,* 791 F.2d 923 (3d Cir.), *cert. denied,* 107 S.Ct. 150 (1986).

[41] *Id.* at 151.

[42] *Id.*

[43] 18 M.J. 316 (C.M.A. 1984).

[44] 23. M.J. 71 (C.M.A. 1986).

[45] *Id.* at 75.

protected in any way.[46] Despite these problems, the court found the statement was protected. The court's analysis says a lot about its future interpretation of Rule 410.

The court began by noting that Federal Rule 410 would not protect the statement for the reasons listed above.[47] *Robertson* is not mentioned in the opinion. Instead of the *Robertson* approach, the court looked at whether the letter might affect the commander's decision about how to act on the case. The court found the letter was an "integral part of the administrative punishment or discharge process, albeit in its incipient stage."[48] This analysis is completely inapposite to the *Robertson* approach.

In *Robertson* the focus is on the accused's subjective expectations and whether those expectations are reasonable under the circumstances.[49] In *Barunas* the Court focuses on the intentions of the government and the use of the statement by the government representative. The Court then finds that, because the letter was used for a purpose promoted by Rule 410, (i.e. a decision on how to proceed on the criminal charges) the statement is protected.[50] Presumably, in future cases the court will give an accused the benefit of Rule 410 based either on his expectations under *Robertson*, or on the government's use of the evidence. The result of this approach is a simple, functional analysis. If the evidence was used for a function contemplated by Rule 410, or proffered in expectation of its use as such, it is protected. This rationale makes sense in light of the Court's statement in *Barunas* that "excessively formalistic or technical approaches to this rule may undermine these policy concerns [supporting Rule 410] in the long run."[51]

Who are the Government Representatives Authorized to Engage in Plea Discussions?

This is the last and, in some ways, the most critical question in an analysis of Rule 410. This is a developing area where future court decisions can drastically affect the scope of protection afforded an accused under the rule. Under Federal Rule 410, the government representative for plea discussions is "an attorney for the prosecuting authority," while Federal Rule of Criminal Procedure 11 uses the similar phrase "an attorney for the government." Military Rule 410, in deference to military procedure, reads "convening authority, staff judge advocate, trial counsel or other counsel for the Government." The short answer, and perhaps the one the courts will ultimately settle on, is that the representatives listed in Rule 410 are the only ones permitted to engage in protected plea discussions. Federal case law, however, indicates that the answer may not be so clear.

To understand the development of the law in this area, a few historical facts are important. Neither Federal Rule 410 nor Federal Rule of Criminal Procedure 11 expressly limited plea discussions to prosecuting attorneys until the 1980 amendments to the rules. Prior to 1980 the federal courts interpreted Federal Rule of Criminal Procedure 11 and Federal Rule 410 broadly, rising to the most expansive interpretation in 1977 in *United States v. Herman.*[52]

The defendant was accused of robbing a post office and killing a postal officer. After arraignment, the defendant asked postal officers, who were transporting him back to jail, whether they would drop the murder charge if he pleaded guilty to robbery and gave them the gun his buddy fired. The postal officers rejected the deal, but accepted his statement and used it against Herman at trial. On appeal, the Fifth Circuit held that "[s]tatements are inadmissible if made at any point during a discussion in which the defendant seeks to obtain concessions from the government in return for a plea."[53]

Spurred by this case, Congress amended the rules, showing a legislative intent to restrict the authorities with which a defendant could discuss plea bargains with impunity.[54] Several later cases, however, demonstrate that the door to expansion of the rule in this area may still be open.

One method, used by the courts in expanding authority beyond the prosecutors to investigators, is express authority. *United States v. Grant,*[55] mentioned earlier, involved a county judge suspected of complicity in a kickback scheme and his negotiations with federal investigators. The FBI agent on the case had been given express authority by an Assistant United States Attorney (AUSA) to offer Grant a plea to a one-count indictment in return for his full cooperation.[56] The Eighth Circuit extended the protection of Federal Rule 410 to this discussion under an express authority theory.[57] Later discussions with the same agent were not protected, in part, because the agent stated that he had no more authority to negotiate.[58]

In *United States v. Rachlin,*[59] the Eighth Circuit confirmed the validity of an express authority theory and, in dicta, suggested that apparent authority may be available as well. Rachlin was accused of passing counterfeit bills and had retained an attorney to assist him in, among other things, dealing with the AUSA assigned to the case. The attorney met with the AUSA on March 8 and was told that

---

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Robertson,* 582 F.2d at 1366.

[50] *Barunas,* 23 M.J. at 76.

[51] *Id.* at 76.

[52] 544 F.2d 791 (5th Cir. 1977).

[53] *Id.* at 797.

[54] Rachlin v. United States, 723 F.2d 1373, 1376 (8th Cir. 1983).

[55] 622 F.2d 308 (8th Cir. 1980).

[56] *Id.* at 310.

[57] *Id.* at 314.

[58] *Id.* at 315.

[59] 723 F.2d 1373 (8th Cir. 1983).

the government was not ready to discuss any plea bargains.[60] Four days later, Rachlin's attorney set up a meeting with the Secret Service agents on the case, had his client execute a rights waiver, and let the client give a full statement.[61] In holding the statement admissible, the court noted that the agents had no express authority, but went on to add that the agents neither made an offer to deal nor indicated in any other way that they had authority to bargain with the defense.[62] Such facts would be relevant on the issue of apparent authority.

Apparent authority dovetails nicely with the *Robertson* analysis of what constitutes a plea discussion. In the *Robertson* analysis, the court looks at the defendant's reasonable expectation that the discussion is a plea negotiation. Indicia of apparent authority from investigators, or others who might reasonably be given express authority, would be good evidence of a defendant's reasonable, subjective belief that he was engaged in a plea discussion. It makes sense that the same rule should apply in analyzing whether a plea discussion is with an authorized representative, and, therefore, protected, especially with the Court of Military Appeal's guidance to avoid an "excessively formalistic or technical approach to this rule."[63]

In any motion to suppress a statement based on apparent authority, the defense should also urge suppression on due process,[64] article 31,[65] or Military Rule of Evidence 304[66] grounds, arguing that the statement is involuntary because it was induced by the false representations of government agents.

Pitfalls and Pointers for Counsel

The first and most obvious pointer is to ensure that the nature of any plea discussion is clear to both sides at the outset. This is a good idea for the government, as the courts have uniformly rejected exclusionary motions when the government representative disclaimed his authority or intent to plea bargain.[67] For the defense it avoids the problem encountered by the defendant and his attorney in *Rachlin* or the county judge in *Grant;* that is, having the attorney's or client's statements used by the government in open court.

As a corollary to the first pointer, the defense should make sure to include the requisite quid pro quo of a plea agreement in any discussion so it cannot later be characterized as a bargain for immunity, confession in hope of lenient treatment, or some other unprotected variant.

Once the defense has a deal with the government, be careful about renegotiating a better deal—even in light of changed circumstances. For example, if the defense in a larceny case negotiated a deal for nine months and, later, the defendant made full restitution, the defense attorney might wish to negotiate a further reduction due to the mitigating behavior. Should the defendant withdraw from the deal, the client could see his attorney's admission of guilt produced in open court. A clear agreement with the government that renegotiations are protected will suffice to protect the client's interest, and the attorney's malpractice premium.

Offers to negotiate when the trial counsel or staff judge advocate express no desire to entertain any plea agreement is a risky business under federal case law, as *Rachlin* demonstrates. This may not be a problem in military practice because offers must originate with the defense.[68] This is, however, neither clear nor certain, and a cautious defense counsel will get express statements from the government that such discussions are protected.

Negotiations with lower-level commanders may not be protected. The rule does not indicate whether "convening authority" includes all convening authorities in the chain of command, or only the one actually taking action on a case. For this reason a defense counsel may not know who is a legitimate government negotiator until referral. *Barunas* supports the position that Rule 410 be flexible enough to protect legitimate and accepted negotiation with any convening authority. As with renegotiation, an express statement from the government extending protection is the safe approach.

Each side should examine the dealings a suspect or accused has with government representatives. Government counsel for their part should ensure that investigators and lower commanders do not represent that they have authority to conduct plea negotiations. The defense should question each client who had made a statement to the government, see if he was conducting a plea negotiation; and establish whether the government representative had express authority or indicated that he possessed such authority. This is fertile, but unexplored ground in which to nurture a motion to suppress.

Conclusion

Rule 410 is a fertile ground for defense practice and a pitfall for the unwary counsel who does not know the limits of the rule's protection. Defense counsel should be vigorous in pushing the limits of Rule 410 and cautious in ensuring that their own dealings with the government are clearly protected. This is one area of protection afforded an accused that may see expansion in favor of the defense. Government counsel, on their part, must police this area carefully to avoid providing gratuitous protection to incriminating statements made by the accused.

---

[60] *Id.* at 1375.

[61] *Id.*

[62] *Id.* at 1376.

[63] United States v. Barunas, 23 M.J. 71, 86 (C.M.A. 1986).

[64] U.S. Const. amend. V.

[65] Uniform Code of Military Justice art. 31, 10 U.S.C. § 831 (1982).

[66] Mil. R. Evid. 304.

[67] *See* United States v. Sebetich, 776 F.2d 412 (3d Cir. 1985); United States v. Keith, 764 F.2d 263 (5th Cir. 1985).

[68] R.C.M. 705(d)(1).

Courts-Martial Contempt—An Overview

Lieutenant Colonel David L. Hennessey
Military Judge, Fourth Judicial Circuit, Fort Lewis, Washington

Reported instances in which courts-martial have exercised their contempt power are few, with less than a dozen pertinent cases contained in the Court-Martial Reports or Military Justice Reporter. This may in part be due to the high professional standards to which virtually all parties to the trial of courts-martial aspire. The mere existence of the contempt sanction may also serve as an incentive to cause the aberrational counsel, recalcitrant witness, or disruptive spectator to conform his or her conduct to recognized standards of acceptable behavior. The fact that, after review by the convening authority, any finding of contempt is not subject to further review or appeal may serve to explain the paucity of appellate cases. While most practitioners before courts-martial know generally that the court may exercise contempt power, too few understand the limitations upon, and procedures to be employed, in the exercise of that power.[1] It is for these reasons that this article is written.

The Source of Contempt Power

Article 48 Uniform Code of Military Justice is the statutory source of military contempt power. It provides:

> A court-martial, provost court, or military commission may punish for contempt any person who uses any menacing word, sign, or gesture in its presence, or who disturbs its proceedings by any riot or disorder. The punishment may not exceed confinement for 30 days or a fine of $100.00, or both.[2]

Rule for Courts-Martial 801 sets forth the responsibilities of the military judge and provides that the military judge may, subject to rule 809, exercise contempt power.[3] Rule 809 provides that courts-martial may exercise contempt power under article 48 and provides guidance regarding the methods of disposition and procedures for contempt proceedings.[4] The Military Judge's Benchbook also contains procedural guidance regarding the exercise of courts-martial contempt power.[5]

Contemptuous Conduct Defined

Article 48 makes punishable only direct contempts. Direct contempts are those contempts that occur in the presence of the court-martial or in its immediate proximity.[6] Indirect contempts, which could include such matters as failure to conduct a previously-ordered mental examination or to produce an ordered witness, are beyond the scope of article 48.

The exercise of contempt power must, of necessity, be preceded by some form of actual or alleged contemptuous conduct. Such conduct could involve harsh words uttered in open court between a counsel and the military judge. An interesting example of such conduct occurred during the court-martial of Captain John J. DeAngelis.[7] During a witness production motion the law officer (LM), the precursor to today's military judge, asked defense counsel (DC) why the requested witnesses were material. In response, the defense counsel launched into a diatribe directed toward and critical of the law officer. He concluded his remarks by saying to the law officer and members, "[I]f you ever pronounce judgement on this accused without the power to produce the witnesses, you will each and everyone be held civilly liable."[8] The following interesting colloquy occurred when the law officer learned that a defense requested witness, Dr. Sonaglia had been present at the site of trial for several days with counsel's knowledge.

> LM: "Songlia was here the last few days. Why didn't you put him on the stand, Mr. Carroll?"
>
> DC: "Are you asking that question in sincerity, or trying to be funny?"
>
> LM: "I am asking it sincerely and I never try to be funny. You have had him three days . . ."
>
> DC: "You want to know why I didn't put him on the witness stand?"
>
> LM: "You keep asking for him continually."
>
> DC: "Have you ever tried a case? That is the most absurd question I ever heard of. You want to know why I didn't put him on the witness stand? Any first year law student would know that."
>
> . . .
>
> DC: "I haven't finished interviewing Sonaglia."[9]

---

[1] *See* McHardy, *Military Contempt Law and Procedure*, 55 Mil. L. Rev. 131 (1972), for a comprehensive review of the origins and development of military contempt power.

[2] Uniform Code of Military Justice art. 48, 10 U.S.C. § 848 (1982).

[3] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 801 [hereinafter R.C.M.].

[4] R.C.M. 809.

[5] Dep't of Army, Pamphlet No. 27–9, Military Judges' Benchbook, app. E (1 May 1982) (C2, 15 Oct. 1986).

[6] *Ex parte* Savin, 131 U.S. 267 (1888).

[7] United States v. DeAngelis, 3 C.M.A., 12 C.M.R. 54 (1953).

[8] *Id.* at 58, 59.

[9] *Id.* at 59.

With regard to such behavior, then Chief Judge Quinn stated, "In instances of such flagrantly contemptuous conduct, law officers should not hesitate to employ the power granted by article 48 . . . especially when counsel has been warned against such action."[10] The court concluded that the court-martial should have exercised its power under article 48. In *United States v. Cole*,[11] the Court of Military Appeals again urged trial courts not to hesitate to use the contempt power to ensure that courts-martial proceed in a fair and orderly manner. In *Cole*, the prosecutrix in a rape case refused to submit to cross-examination on matters relating to her character and engaged in an "outburst" toward the accused. The witness simply refused to cooperate and displayed a "contumacious attitude" that greatly concerned the court. The woman's actions were quite clearly contemptuous.

A more difficult question in military practice concerns whether conduct must be riotous, threatening, or confrontational to be contemptuous. In a civilian case, the United States Court of Appeals for the Third Circuit sustained orders of criminal contempt against an attorney in circumstances far removed from those of *DeAngelis* or *Cole*. The court found that an attorney who persisted in stating his reasons for objecting to the rulings of the court, and in cross-examining a witness with regard to questions not covered during direct examination (despite repeated orders of the trial judge), had offended the dignity and authority of the court and thereby obstructed the administration of justice. The court stated, "That Mr. Freeman [the cited attorney] may have been polite, respectful and perhaps even subdued in his disobedience is irrelevant; overt physical disorder is not necessary to obstruct the administration of justice."[12]

Whether such conduct would constitute a direct contempt under article 48 is a difficult and presently unresolved matter. The difficulty is caused by the plain language of article 48, which makes punishable "any menacing word, sign or gesture . . . or (any person) who disturbs the proceeding by any riot or disorder." This phrase has been subject to little judicial interpretation. The legislative history of article 48 would support the proposition that the article was intended to make punishable the same conduct that would constitute a direct contempt in the federal criminal courts.[13] The Army Court of Military Review, however, stated in *United States v. Gray*[14] that the language of the military contempt statute has always been more limited than the traditional contempt power of the civilian courts. *Gray* concerned an alleged surreptitious threat from the accused to the trial counsel. The threat was not known to the military judge until after the fact. As the conduct caused neither disruption of the accused's trial nor was an affront to the military judge, the military judge's refusal to exercise his contempt power was held to be appropriate.

Conduct such as that of the attorney Freeman mentioned above should constitute contemptuous behavior under article 48. It is an affront to the court and a disruption of the orderly and dignified conduct of a criminal trial. Until the military appellate courts resolve this issue, however, some uncertainty remains with regard to the exercise of the contempt power in such situations.

The Court of Military Appeals has granted a petition for review and held a hearing in *United States v. Burnett*.[15] *Burnett* could provide some much-needed guidance in this area. A civilian defense counsel was found in contempt by the members and sentenced to a $100.00 fine and a reprimand. The contemptuous act concerned the defense counsel's questioning of a witness after the military judge had arguably precluded him from pursuing a particular matter. The critical question was: "Q: Okay, now Captain C asked you before when you stopped believing John D was telling the truth, and he and the military judge would not let you finish your answer. . . ."

This question, which was critical of the trial counsel and military judge, eventually led to the finding of contempt. In his instructions to the court, the military judge informed the members that any disorder or disrespect may be punished as a contempt.

The Army Court of Military Review affirmed *Burnett* in an unpublished opinion.[16] The Court of Military Appeals specified the following issues:

> I. Whether the military judge properly defined "contempt" in his instructions to the court members.
>
> II. Whether the conduct of the civilian defense counsel constituted "contempt" in terms of article 48 Uniform Code of Military Justice and paragraph 118, Manual for Courts-Martial, United States, 1969 (Revised Edition.)
>
> III. Whether a military judge sitting in a court deriving its power from Article I of the Constitution has the same inherent power to summarily punish contempts as does a Federal District Judge. . . .

The decision in this case could provide practitioners with the answer to a number of heretofore unresolved questions and could include meaningful guidance regarding the scope of conduct proscribed by article 48.

Who May be Punished

Although historically there was disagreement on this point, it is now well-settled that any person whether witness, clerk, counsel, reporter or spectator, civilian or military, is subject to the provisions of article 48.[17]

---

[10] *Id.* at 60.

[11] United States v. Cole, 12 C.M.A. 430, 31 C.M.R. 16 (1961).

[12] Pennsylvania v. Local Union of Operating Engineers, 552 F.2d 498 (3d Cir.), *cert. denied*, 434 U.S. 822 (1977).

[13] Ochstein, *Contempt of Court*, 16 JAG J. 25, 27 (1962); Index and Legislative History, Uniform Code of Military Justice, Hearings on H.R. 2498 Before a Subcommittee of the House Committee on Armed Services, 81st Cong., 1st Sess. 1060 (1949).

[14] United States v. Gray, 14 M.J. 551 (A.C.M.R. 1982).

[15] 21 M.J. 410 (C.M.A. 1986); 23 M.J. 253 (C.M.A. 1986).

[16] United States v. Burnett, CM 444568 (A.C.M.R. 30 Apr. 1985).

[17] McHardy, *supra* note 1, at 145, 147.

Method of Disposition

When the contemptuous conduct occurs directly in the presence of the court-martial such conduct may be punished summarily. The trial is suspended while the contempt is disposed of.[18]

If, however, the conduct occurs outside the presence of the court-martial, such as in a witness waiting area near the courtroom, it may not be dealt with summarily. The Supreme Court has held that due process requires that the alleged contemnor be accorded notice and a fair hearing at which he must have the opportunity to show that the version of the alleged contempt related to the court was inaccurate, misleading, or incomplete.[19] Additionally, R.C.M. 809 (b)(2) further provides that in this situation the alleged offender shall have the right to be represented by counsel and shall be so advised. The contempt must be proved beyond a reasonable doubt.

Who May Punish

Article 48 states that "court[s]-martial" may punish for contempt. If members are present they, and not the military judge, are the court-martial.[20] In a trial by military judge alone, the military judge is the court-martial. During article 39a sessions the military judge may "call the court into session without the presence of the members." During such sessions the military judge therefore acts as the court-martial within the meaning of articles 16 and 48.[21]

Thus, if contemptuous conduct occurs during a trial session when the court members are not present, the military judge may punish the contempt, either summarily or upon notice and hearing. This depends upon whether the military judge personally observed the conduct, or it otherwise came to his attention.[22]

When the members are present, contempt proceedings may be initiated by the military judge or upon motion of any member unless the military judge rules that, as a matter of law, contempt has not been committed.[23]

If contempt proceedings are initiated, the military judge shall (using appendix E of the Military Judges' Benchbook) instruct the members so that they may properly decide whether a contempt has been committed and what punishment, if any, to impose. The members shall, based upon secret written ballot during closed session deliberation, decide whether to hold an alleged offender in contempt. At least two-thirds of the members must concur in any finding of contempt, unless the members directly witnessed the conduct in question in the presence of the court-martial and find it to be contemptuous, and thus subject to being punished summarily.[24] If the members find the offender in contempt they shall, without reopening the court-martial determine the punishment, if any, in accordance with the procedures used to deliberate and vote on a court-martial sentence. These procedures are contained in Rule for Courts-Martial 1006. The findings and, if necessary, sentence are announced in open court by the president.[25]

Action by the Convening Authority

The contempt proceeding shall be made a part of the record of the case in which the proceeding was conducted. If a person was held in contempt, a separate record shall be prepared and forwarded to the convening authority. The convening authority may disapprove all or part of the sentence. The convening authority's action is not subject to further review or appeal.[26]

With regard to contempt sentences, a sentence to confinement begins to run when adjudged unless deferred, suspended, or disapproved by the convening authority. A military judge may delay announcing the sentence after a finding of contempt to permit the person involved to continue to participate in the trial.[27] (Such action could be appropriate when dealing with an obstreperous counsel or indispensable witness.) The convening authority shall designate the place of confinement for any civilian or military person held in contempt. In the case of a civilian contemnor, this may generate some practical problems that prior planning could minimize or eliminate. A fine does not become effective until ordered executed by the convening authority. The person held in contempt shall receive written notice of the holding and sentence, if any, of the court-martial as well as the actions of the convening authority upon the sentence.[28]

Summary

The foregoing constitutes an explanation of how, and to some extent in what situations, military contempt power may presently be exercised. As officers of the court, counsel for both government and defense should be familiar with these provisions. Likewise counsel, especially government counsel, would be well advised to anticipate and resolve to the maximum extent practicable any problems that would be associated with enforcing an approved finding of contempt. A notable example of such a problem concerns where and how a civilian contemnor would be confined.

Use of the authority granted by article 48 should be rare. Potentially difficult situations that occur during a trial often can be defused with an admonishment or warning to the potential contemnor, or perhaps by ordering an offensive party removed from the vicinity of the trial. Such action can be justified by the military judge's responsibility to

---

[18] R.C.M. 809(b)(1).

[19] Johnson v. Mississippi, 403 U.S. 212 (1971).

[20] UCMJ art. 16.

[21] R.C.M. 809 analysis.

[22] R.C.M. 809 (c)(1).

[23] R.C.M. 809 (c)(2).

[24] R.C.M. 809 (c)(2)(B).

[25] R.C.M. 809 (c)(2)(D).

[26] R.C.M. 809 (d).

[27] R.C.M. 809 (e).

[28] R.C.M. 809 (f).

maintain the dignity and decorum of the proceedings. A potential contemnor may be subject to an independent prosecution under a specific statute, such as disobedience of an order, disorderly conduct, or perhaps obstruction of justice in appropriate circumstances. The case of the contemptuous accused may be dealt with in a number of ways, which ultimately can include such drastic measures as binding and gagging or expulsion in appropriate circumstances.[29] The point is that feasible alternatives to the exercise of contempt power do exist, and should be considered before or in conjunction with the exercise of contempt power.

Recommendations

Many of the following recommendations are not new, but they are still worthy of serious consideration.[30] Courts-martial contempt power should be vested in the military judge, who bears the overall responsibility for conducting the trial in a fair and orderly manner. This would also eliminate the present cumbersome procedure used when court members must make determinations involving alleged contempts. The maximum fine should be increased to $500.00 or $1,000.00. Such a penalty would pose a realistic and more effective sanction for contemptuous behavior that lies somewhere between the minimal fine of $100.00 and the drastic sanction of confinement. In the absence of judicial clarification, article 48 should be amended to proscribe "contempts" committed within the presence of the court-martial, provost court, or military commission. Such an amendment would lay to rest concern about the meaning of the phrase, "menacing word, sign or gesture, . . . riot or disorder," contained in the current article. Also, the federal courts could be viewed as direct sources of authority insofar as properly defining contemptuous conduct is concerned.

For the moment, however, article 48 as implemented by rule 809 constitutes the governing provision regarding contempt before courts-martial. I trust that this article has afforded the reader an opportunity to, at least in a general way, become familiar with the limitations upon and procedures to be employed in the exercise of that contempt power.

[29] Illinois v. Allen, 397 U.S. 337, 343–346 (1970).

[30] *See* McHardy, *supra* note 1, at 164–67; R.C.M. 809 analysis.

Basic Details of Trial Preparation

Lieutenant Colonel Michael B. Kearns
Military Judge, Fourth Judicial Circuit, Fort Lewis, WA

It is the rare attorney who, when practicing before courts-martial, does not want to do a good job of representing his/her client, whether it is the U.S. Army or an individual defendant. Often when an attorney performs poorly, it is because of a lack of attention to basic and what can seem trivial points in the practice of trial advocacy. In this article I would like to underscore four areas to which counsel, in their trial preparation, need to pay close attention.

Neither the trial counsel or the defense counsel should assume that the administrative portions of the charge sheet have been correctly filled out. One of the first things both the counsel need to do is critically read the entire charge sheet. The trial counsel must verify that all the personal data concerning the accused is correct, including the status as to pretrial restraint. Additionally, all affidavits and signature blocks on the charge sheet should be thoroughly checked to ensure they have been filled out and signed by the proper persons. The defense counsel must also check the same information, although probably not with the same goal in mind as the trial counsel. Defense counsel always should ask the client if he/she has been under any pretrial restraint. It is remarkable how many times no one asks the defendant this question until the military judge does so in court.

Both trial and defense counsel must proofread, not only the specifications of a charge, but all documents that will be submitted to the court. With regard to the specifications, the only way to check them is for counsel to personally compare them with the form specifications found in the Manual for Courts-Martial, 1984. Counsel who do not personally perform this task on each case will eventually be embarrassed in court.

Two documents that must always, without exception, be critically proofread are stipulations of fact and pretrial agreements. That counsel would submit either of those documents to a court with errors in them seems unbelievable. Yet practice proves otherwise. In stipulations of fact associated with guilty pleas, often the stipulated dates or place of the offense vary from those charged; the amount of a "bad" check differs from the amount reflected in the specification; or none of the paragraphs indicate that the accused transferred the substances in a stipulation concerning the transfer of illegal substances. Often the sentence limitation provision in pretrial agreements will fail to mention, contrary to the agreement of the parties, that forfeitures are to run for "x" number of months or that a suspension of a part or all of the sentence is to run for a stated period of time. These, and similar, errors can be laid directly at the feet of counsel and are based upon a failure to critically read a document before signing it. No counsel may ever assume that, just because the draft of a document was letter perfect, the final copy will be too.

The trial attorney must plan all facets of the case with great care and forethought. Plan out what you want to do, how you will do it, what your opponent's likely response

will be, and your countermeasure. I suggest that counsel would be wise to "wargame" their cases with more experienced counsel. If that is not possible, at least do it with another trial attorney. Counsel must be prepared to intelligently support their contentions with cites to applicable statutory/regulatory and case law. Always cite to the judge cases in support of your position. Do not, for example, just rely on a cite to a Military Rule of Evidence. This means, especially for inexperienced counsel, burning a lot of midnight oil while wading through the cases. Long hours and weekend research are the lot of trial attorneys. "The Law is a jealous mistress" is not an idle adage.

The last task I will address concerns the trial counsel. The trial counsel is the person primarily responsible for the preparation of a record of trial. Like it or not, that is the law. Thus the trial counsel must not only cause a record of trial to be prepared, but also closely read it to ensure the record is complete and accurate. It appears that many trial counsel either do not know of this requirement or take it lightly. Either way it is a gross dereliction of basic advocacy principles to not make sure that the record of a trial you prosecuted is prepared promptly and accurately. The trial counsel must read every page of a record of trial, and check to make sure all exhibits have been attached. Don't assume that, because a verbatim court reporter prepared a record, it is complete and accurate. Court reporters, like all humans, make mistakes. The trial counsel's job is to catch and correct those errors in the record of trial.

The common thread in these four pointers is attention to detail. That is the common thread uniting all forms of law practice. As an attorney, you may never stop paying attention to detail.

New Rule on Peremptory Challenges

United States v. Carter, 25 M.J. 471 (C.M.A. 1988), established a new rule that authorizes a military judge to grant additional peremptory challenges under certain circumstances. Trial Judiciary Memorandum 88–7 (30 Mar. 1988), explains the *Carter* decision. Because of its importance, the text of the memorandum is reproduced below.

1. In *United States v. Carter*, the Court of Military Appeals prospectively overruled *United States v. Holley*, 17 M.J. 361 (C.M.A. 1984), which limited peremptory challenges to one per side. Writing for a divided Court, Chief Judge Everett opined that under Article 41(b), UCMJ, an accused might be "entitled" to more than one peremptory challenge as a matter of right. In *Carter* the accused challenged three members of a nine-member panel for cause. Each side exercised its one peremptory challenge, thus reducing the panel below a quorum. Five more members were then detailed by the convening authority. The defense thereupon asked for an additional peremptory challenge. That request was denied by the military judge, who stated that neither side was entitled to a further challenge. At that point, further challenges for cause were made by the defense and several were granted by the military judge. In light of the above facts Chief Judge Everett found a statutory basis within Article 41 for additional peremptory challenges.

2. Judge Cox, concurring, joined Chief Judge Everett in overruling *United States v. Holley*. However, he indicated that his decision was not based on any additional "statutory" right. Instead he found a broad discretionary authority for the military judge to grant additional peremptory challenges apparently derived from the judge's duty to ensure fundamental fairness. Thus, the military judge might not be "required" to grant additional peremptory challenges given facts similar to those in *Carter*.

3. Judge Sullivan, concurring in the result, would not overrule *Holley*. Instead, he found sufficient room within the language of *Holley* and Judge Cox's concurring opinion to reach the final result. He would not require military judges to grant additional peremptory challenges in cases similar to *Carter*.

4. Military judges should be aware that *United States v. Holley* has been overruled. Be alert for this situation. In cases where additional members are added after the use of peremptory challenges, military judges should be liberal when considering any defense requests for more peremptory challenges. *Carter* indicates that denial of a request for an additional peremptory challenge is reviewable on an "abuse of discretion" basis.

Government Appellate Division Note

The Providence Inquiry: Trial Counsel's Role

Captain Randy V. Cargill
Government Appellate Division

Introduction

The trial counsel faces many obstacles in his path to success. He must marshal his proof, overcome defense motions, prove his case beyond a reasonable doubt, and obtain an appropriate sentence—all while fulfilling his other numerous responsibilities. It is no wonder that trial counsel breathe a sigh of relief when the accused initiates an acceptable plea bargain agreement. There is a natural inclination to view the case as being "over" and focus on the next case. I write to emphasize that guilty plea cases are not over until they are over, i.e., the findings and sentence are affirmed on appeal.

This article will discuss the requisites of a provident plea of guilty and focus on the recurring appellate issue involving matters inconsistent with guilt in guilty plea cases. The emphasis will be on practical steps the trial counsel can take to ensure that the accused's well-deserved conviction and sentence stick.

Background

Every trial counsel is familiar with the litany of questions that the military judge asks an accused who desires to plead guilty.[1] Why do military judges pose these questions and why, at times, do they appear to be asking the accused to reconsider his decision to plead guilty? The answers are found in article 45(a) of the Uniform Code of Military Justice[2] and the cases interpreting that provision.

Article 45(a) provides:

> If an accused after arraignment makes an irregular pleading, or after a plea of guilty sets up matter inconsistent with the plea, or if it appears that he has entered the plea of guilty improvidently or through lack of understanding of its meaning and effect, or if he fails or refuses to plead, a plea of not guilty shall be entered in the record, and the court shall proceed as though he pleaded not guilty.

Its drafters were determined to keep the military justice system beyond reproach by ensuring that pleas of guilty accord with the facts, and that individuals who enter such pleas are aware of the consequences.[3]

Rule for Courts-Martial 910 implements article 45(a) and establishes the procedural steps the military judge must follow before accepting a plea of guilty.[4] He must advise the accused of the nature of the offense, the minimum (if any) and maximum penalties, the right to counsel, the right to plead not guilty, and that a plea of guilty waives substantial rights. In addition, the military judge must ensure that the plea is voluntary and accurate by questioning the accused (the accused must answer questions relating to the factual basis for his plea under oath).

R.C.M. 910 codifies case law interpreting article 45(a). The leading case is *United States v. Care*.[5] In *Care*, the Court of Military Appeals, after noting that its earlier recommendation in *United States v. Chancelor*,[6] had "received less than satisfactory implementation," set forth specific requirements for the providence inquiry. The most important of those requirements (at least for purposes of this article) is that the military judge must personally question the accused about "what he did or did not do, and what he intended (where this is pertinent), to make clear the basis for a determination . . . whether the acts or omissions of the accused constitute the offense or offenses to which he is pleading guilty."[7] This requirement has become widely known as the *Care* inquiry and has caused at least one appellate court (and, no doubt, many counsel) to refer to the inquiry as "running the gauntlet."[8]

While one can complain about the manifest paternalism of the military providence inquiry,[9] such complaints have no place at trial. The trial counsel must know the requirements of a provident plea of guilty and should be aware of problem areas.

Problems

Predictably, the *Care* inquiry engendered many appellate issues. As Judge Cox recently observed in *United States v. Penister*,[10] an accused has a natural tendency to rationalize his or her behavior and minimize guilt. In the process, he or she often raises matters inconsistent with the plea. Left unresolved, these matters can render a plea of guilty improvident and entitle the accused to a rehearing. Then, if the accused pleads guilty at the rehearing, the maximum penalty is the lesser of the adjudged sentence or the negotiated sentence limitation. If the accused pleads not guilty, the maximum penalty is the adjudged sentence.[11] Appellate defense counsel frequently seize the opportunity to get another bite of the apple, and often they succeed. Trial counsel should understand how inconsistent matters generally arise and how to resolve them.

Inconsistent Matters

United States v. Palus[12] illustrates the impact of matters inconsistent with pleas of guilty. Private Palus pleaded guilty to numerous specifications of making and uttering worthless checks and forgery. During the providence inquiry, he stated that he had incurred considerable gambling debts at a Las Vegas casino a few years earlier, and he still owed the casino a substantial amount of money. Private Palus explained that his wife was recently in Las Vegas, and his creditors harassed her about the debts. While describing his offenses, Palus asserted that he feared for his family's physical safety and "was almost what you say forced to do it."[13] The military judge accepted the pleas of guilty and did not inquire about a possible defense. During the presentencing hearing Private Palus made an unsworn statement in which he stated that he was "deathly afraid that they were going to come after . . . [his wife] physically" and he

---

[1] *See* Dep't of Army, Pamphlet No. 27-9, Military Judge's Benchbook, paras. 2-9, 2-14, 2-15, 2-20 (C1, 15 Feb. 1985).

[2] Uniform Code of Military Justice art. 45(a), 10 U.S.C. § 845(a) (1982) [hereinafter UCMJ].

[3] *See* Hearings before House Armed Services Committee on H.R. 2498, 81st Congress, First Session 1052-57 (1950).

[4] Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 910(c)(e) [hereinafter M.C.M. and R.C.M., respectively]. *See also* M.C.M., para 70*b*(3); Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 70*b*.

[5] 18 C.M.A. 545, 40 C.M.R. 247 (1969).

[6] 16 C.M.A. 297, 36 C.M.R. 453 (1966).

[7] *Care*, 40 C.M.R. at 253.

[8] This metaphor is found in United States v. Parker, 10 M.J. 849, 851 (N.C.M.R. 1981).

[9] It is constitutionally permissible for an individual to plead guilty despite protestations of innocence. North Carolina v. Alford, 400 U.S. 25 (1970). An individual may plead guilty, for example, to expeditiously resolve the controversy or to avoid the expense and embarrassment of trial. *See* Blackledge v. Allison, 431 U.S. 63, 71 (1977). Judge Cox has stated his belief that UCMJ art. 45 does not require an accused to "admit unequivocally each and every element of the offense." United States v. Penister, 25 M.J. 148, 153 (C.M.A. 1987) (Cox, J. concurring).

[10] 25 M.J. 148, 153 (C.M.A. 1987) (Cox, J. concurring).

[11] *See* R.C.M. 810(d)(1) and (2); UCMJ art. 63.

[12] 13 M.J. 179 (C.M.A. 1982).

[13] *Id.*

felt he "had to get them this money."[14] Again, the military judge did not inquire about a possible defense.

The Court of Military Appeals did not hesitate in finding error, noting that Private Palus's contention that he was forced to commit his crimes to save his family was inconsistent with his plea of guilty because the contention raised the defense of duress. The court held that the military judge should not have accepted the pleas of guilty "as the record stood."[15]

What should the military judge have done? Three cases provide the answer. *United States v. Timmins*[16] requires the military judge to personally address the accused and learn his attitude regarding the potential defense (conclusory remarks by defense counsel that the raised defense is not valid are not sufficient). *United States v. Jemmings*[17] notes that the military judge is "well advised to clearly and concisely explain the elements of the defense in addition to securing a factual basis to assure that the defense is not available." Finally, the recent case of *United States v. Johnson*[18] counsels the military judge to "specifically ask the accused whether he has reviewed the evidence with his counsel and determined that it is inadequate to afford him an 'effective legal defense.' "[19]

The teaching of these cases is that the military judge, and thus the trial counsel, must pay careful attention when the accused speaks. If the accused raises a defense or other matter inconsistent with guilt,[20] the inconsistency must be resolved. Effective resolution requires discussion of the potential defense[21] with the accused, culminating in an indication that the accused and his counsel have concluded the defense is ineffective.[22] Significantly, this obligation exists even when the comments raising the defense are not deemed credible by the military judge.[23] Again, failure to resolve the inconsistency can result in reversal of the finding of guilt and a rehearing.

Recommendations

There are several things the trial counsel can do to avoid this windfall for the accused. They fall into two categories: prevention and cure.

Prevention

As Chief Judge Everett noted in *United States v. Kazena*,[24] an accused "can readily escape" from a plea of guilty any time before the sentence has actually been announced. All he or she needs to do is raise a matter inconsistent with the plea and stick to it. There is little one can do to prevent an accused who is determined to "bust his plea" from doing so. The trial counsel in negotiated plea cases, however, can greatly diminish the likelihood of this occurrence by drafting and holding the accused to a complete stipulation of fact.[25]

The stipulation of fact is a powerful tool for the trial counsel. He can and should include all facts relevant to the offense in the stipulation. It should include, but not be limited to, a recitation of all the elements of the offense.[26] The trial counsel should describe the background, commission, and aftermath of the offenses in detail. In addition, trial counsel should anticipate and foreclose possible defenses. For example, in a controlled drug purchase case, all facts eliminating the possible defense of entrapment (e.g., predisposition evidence) should be included.[27] Finally, the stipulation of fact should be prepared and signed well before trial—ideally in time to be submitted to the convening authority along with the accused's offer to plead guilty—and the trial counsel should make it clear that the stipulation as signed is the minimum the convening authority will settle on.

How can trial counsel prevent deviations—particularly when defense counsel are encouraged to raise objections to agreed upon stipulations of fact?[28] The simplest solution is to require the defense to waive objections to the stipulation

---

[14] *Id.* at 180.

[15] *Id.*

[16] 21 C.M.A. 475, 45 C.M.R. 249 (1972).

[17] 1 M.J. 414, 418 (C.M.A. 1976).

[18] 25 M.J. 553 (A.C.M.R. 1987).

[19] *Id.* at 554.

[20] The courts have articulated various tests to determine whether a matter is inconsistent with guilt. *See, e.g.*, United States v. Timmins, 45 C.M.R. at 253 (accused's testimony must "reasonably raise the question of a defense"); *see also* United States v. Logan, 47 C.M.R. 1, 3, (C.M.A. 1973) (there must be "some substantial indication of direct conflict between the accused's plea and his following statements"). The best guidance, however, for the military judge and trial counsel is found in United States v. Johnson, 25 M.J. at 554, wherein the court noted, "military judges should resolve any doubt concerning the existence of a possible defense in favor of the accused."

[21] The term defense as used here refers both to affirmative defenses and negation of elements of the offense, e.g., lack of necessary intent.

[22] Then Chief Judge Suter appropriately described the exchange that must take place between an equivocal accused and the military judge during the providence inquiry as a "jurisprudential mating dance." United States v. Epps, 20 M.J. 534, 540 (A.C.M.R. 1985) (Suter, C.J., dissenting), *amended in part, reversed in part and remanded*, 25 M.J. 319 (C.M.A. 1987). His call for "a new, rational standard of guilty plea review" (*id.* at 541) may explain Judge Cox's view of UCMJ art. 45. *See supra* note 9.

[23] United States v. Lee, 16 M.J. 278, 281 (C.M.A. 1983).

[24] 11 M.J. 28, 35 (C.M.A. 1981).

[25] As a precondition to entering into a pretrial agreement, the government may require the defense to enter into a Stipulation of Fact. R.C.M. 705(a)(2)(a).

[26] The following is the entire description of the offense of wrongful distribution of marijuana contained in a stipulation of fact in a recently litigated case: "On [date], the accused sold 3.11 grams of marijuana to an undercover Drug Suppression Team member. The transaction occurred at [location]. The transaction involved the transfer of $60.00 in CID funds. The distribution of the marijuana was not for lawful or medicinal purposes."

[27] In the case mentioned *supra* note 26, the accused had signed a sworn statement in which he admitted to previously selling marijuana to ten individuals other than the undercover agent. This information, if included in the stipulation of fact, would have greatly helped in defeating the claim on appeal that the accused's plea of guilty was improvident because the accused raised the defense of entrapment at trial.

[28] *See, e.g.*, Cramer, *Attacking Stipulations of Fact Required by Pretrial Agreements*, The Army Lawyer, Feb. 1987, at 44; Green, *Stipulations of Fact and the Military Judge*, The Army Lawyer, Feb. 1988, at 40.

of fact as a condition of acceptance of the pretrial agreement.[29] This solution removes the military judge from the plea bargaining process and puts the accused on notice up front of the consequences of signing the stipulation of fact.

Arguably, this solution would eliminate the persistent problem of objections to aggravation matters contained in stipulations of fact. The validity of a waiver provision is still controversial; the courts are divided over whether the military judge should entertain objections to matters contained in stipulations of fact.[30] An accused, however, may waive many fundamental rights as part of a pretrial agreement.[31] That an accused can waive these rights and many others (e.g., the complete defense of the running of the statute of limitations) would seem, *a fortiori*, to support the view that an accused can waive objections to aggravation matters or other facts in a stipulation of fact.[32]

In any case, the trial counsel should prepare a detailed stipulation of fact and hold the defense to it. The ready answer to defense complaints about the stipulation of fact is "your client can always exercise his right to plead not guilty."[33]

Cure

The cure for problems associated with matters inconsistent with guilt in guilty plea cases is simple. The military judge must recognize the inconsistency, discuss it with the accused, and ensure that the accused is satisfied that the matter will not provide an effective legal defense. The trial counsel, of course, shares this responsibility. Trial counsel must be attentive in all phases of the guilty plea trial.[34] If the accused reasonably (or even unreasonably) raises a defense, trial counsel should ask the military judge to resolve it. This obligation extends to statements by the accused during sentencing, and to other evidence inconsistent with guilt.[35] If the trial counsel has doubts about whether a defense is raised or a matter is inconsistent with guilt, he should always err on the side of caution and voice his concerns to the military judge.

The military judge must recognize, however, that rejecting the tendered plea of guilty based upon an apparent inconsistency, on the assumption that this is the more prudent alternative from the standpoint of subsequent appellate review, is risky. In *United States v. Penister*,[36] the military judge, responding to a government motion to reject the plea of guilty because of the possible defense of voluntary intoxication raised during the providence inquiry, rejected the plea as improvident. The judge's rationale was that he was not convinced that Penister had the specific intent required for his offense, because he could not remember actually committing the offense.[37] Penister did state that he was convinced, after reading the statements of various witnesses that his actions were intentional. The court held the judge's rejection of the plea was improper, because Penister could have pled guilty even though he could not recall shooting the victim, if he was convinced of his guilt by reliable evidence.[38] The convening authority, therefore, could not withdraw from the pretrial agreement and Penister was entitled to the benefit of his bargain.

Conclusion

Article 45(a) and the many cases interpreting it make it clear that the military judge has an obligation to resolve matters inconsistent with an accused's plea of guilty. The trial counsel shares this obligation and should take steps aimed at preventing inconsistencies at trial and alerting the military judge to the inconsistencies when they do arise. The military judge will appreciate attentiveness by trial counsel, and the virtual windfall created by an overturned guilty plea can be eliminated. While contested cases almost always require more work, and thus more satisfaction in the end, guilty plea cases are far more common[39] A little work on these cases can go a long way toward foreclosing attacks on appeal.

---

[29] A suggested paragraph in the pretrial agreement is: I understand that this agreement will automatically be cancelled if I object to any matters included in the agreed upon stipulation of fact. I waive all objections to use of the stipulation of fact during the findings and sentencing portion of my trial.

[30] *Compare* United States v. Sharper, 17 M.J. 804, 807 (A.C.M.R. 1984); United States v. Keith, 17 M.J. 1078 (A.F.C.M.R. 1984), *certificate for review dismissed*, 21 M.J. 407 (C.M.A. 1986) *with* United States v. Taylor, 21 M.J. 1016 (A.C.M.R. 1986); United States v. Rosberry, 21 M.J. 656 (A.C.M.R. 1985); United States v. Mullens, 24 M.J. 745 (A.C.M.R. 1987); and United States v. Glazier, 24 M.J. 550 (A.C.M.R.), *review granted*, 25 M.J. 387 (C.M.A. 1987) (argued on 16 March 1988).

[31] *See* R.C.M. 705(c)(2).

[32] Chief Judge Everett recently observed "if an accused himself requests that certain uncharged crimes be taken into account in sentencing the judge may be entitled to consider them directly as a basis for imposing sentence." United States v. Kinman, 25 M.J. 99, n.2, (C.M.A. 1987). *See also* United States v. Neil, 25 M.J. (A.C.M.R. 1988) (absent a violation of public policy or fundamental fairness, accused as part of plea negotiation process may stipulate to facts unrelated to charged offenses and military judge may *consider* those facts in determining an appropriate sentence). During oral argument in *Glazier*, both Chief Judge Everett and Judge Cox suggested the permissibility of a waiver of objections to aggravation matters in a stipulation of fact as part of the pretrial agreement.

[33] *See, e.g., United States v. Mullens*, 24 M.J. 745, 749 n.6 (A.C.M.R. 1987).

[34] One military judge has commented that "[s]o very often, after the defense enters a guilty plea, the government counsel goes into a buzz mode until time for presenting the case in aggravation." Kelley, *Providence Inquiry: Counsels' Continuing Responsibility to Their Clients*, The Army Lawyer, Sept. 86, at 13, 14.

[35] *See* R.C.M. 910(h)(2).

[36] 25 M.J. 148 (C.M.A. 1987).

[37] *Id.* at 151.

[38] *Id.* at 152 (citing United States v. Moglia, 3 M.J. 216 (C.M.A. 1977), United States v. Luebs, 20 U.S.C.M.A. 475, 43 C.M.R. 315 (1971), United States v. Butler, 20 U.S.C.M.A. 247, 43 C.M.R. 87 (1977)). *See also* United States v. Clayton, 25 M.J. 888 (A.C.M.R. 1988).

[39] In 1987, for example, 68.6% of the general courts-martial and 66.7% of the BCD special courts-martial were guilty plea cases. *Military Justice Statistics*, The Army Lawyer, Feb. 1988, at 54.

Hindsight—Litigation That Might Be Avoided

Major Edward J. Kinberg
Trial Attorney, Contract Appeals Division

This is another in a continuing series of articles discussing ways in which to avoid contract litigation. The trial attorneys of the Contract Appeals Division will draw on their prior experiences and share their thoughts on avoiding litigation or developing the facts to ensure a good litigation posture.

Problem

For the last year you have been advising the contracting officer on a fairly complex claim submitted by one of the maintenance contractors at your post. The contractor submitted an "invoice" for $54,000.00 a few months before you arrived at the Post. The "invoice" is for two separate matters. The contractor claims that the government failed to pay him for additional labor costs incurred when the government modified the contract to incorporate a new wage rate determination. The total amount for this part of the "invoice" is $43,000.00. The remainder of the "invoice" is for additional work the contracting officer's representative (COR) ordered the contractor to perform at various times over the last few months of the contract. Everybody now agrees that the contractor is owed the full amount of its "invoice". The only remaining issue concerns the contractor's demand for interest from the day it filed the "invoice" two years ago. You are reluctant to approve any interest payments because you believe the contractor's "invoice" was really a claim for a disputed amount under the Contract Disputes Act of 1978 (CDA). Because the claim is over $50,000.00 and is not certified, you do not believe the contractor is entitled to interest under the CDA.

The Solution

Defining the Issues

The first question you must answer is whether the contractor has filed a "proper invoice" under the Prompt Payment Act (PPA), a claim under the CDA, or a combination of the two. If the "invoice" is a proper invoice, the contractor is entitled to interest under the provisions of the PPA. If, on the other hand, the "invoice" is actually a claim for a disputed amount then the CDA will control the contractor's entitlement to interest. If the "invoice" does not fall within the provisions of either act the contractor is not entitled to interest.

The Prompt Payment Act

The interest penalties of the PPA only apply when a contractor submits a "proper invoice". An invoice that requests payment for work that has not been formally incorporated into the contract is not a proper invoice.[1] Because $43,000.00 of the contractor's "invoice" was based on a new wage grade determination incorporated into the contract by modification, that portion is a "proper invoice" under the PPA. Consequently, the contractor is entitled to interest on that portion of the "invoice". The remainder of the "invoice", however, was for additional work ordered by the COR. Because the additional work has not yet been added to the contract, the contractor is not entitled to PPA interest for the remainder of its "invoice".

The Contract Disputes Act

The next question is whether the "invoice" qualifies as a claim under the Contract Disputes Act. While the CDA itself does not define "claim", the standard disputes clause in the Federal Acquisition Regulations defines a claim as "a written demand or written assertion by one of the contracting parties seeking, as a matter of right, the payment of money in a sum certain, the adjustment or interpretation of contract terms, or other relief arising under or relating to this contract."[2] You will need to look at your contract to ensure that the disputes clause uses the same basic language.

Then you must take a hard look at the language in the contractor's "invoice" to determine if it is actually a CDA claim. An invoice that is a "routine request for payment" is not a claim under the CDA.[3] To be a "claim," the Contractor's invoice must "manifest a present, positive intention to seek an equitable adjustment of the contract terms as a matter of legal right."[4] In the present case, the contractor's "invoice" appears to be a CDA claim. It has demanded payment for a specific sum that the Contractor believes it is entitled to as a matter of right.

Even though you have concluded that the contractor's invoice meets the general definition of a claim under the CDA, you are still reluctant to approve interest payments because the claim has not been certified. The CDA requires contractors to certify claims in excess of $50,000.00. You are inclined to conclude that the contractor's "invoice" is really a claim for $54,000.00, which must be certified. Such a conclusion would be incorrect. When a claim involves several items, the ASBCA will examine "each dispute to determine if different independent substantive matters are

[1] Sol-Mart Janitorial Services, Inc., ASBCA No. 32873, 87-3 BCA para. 20,120.

[2] Federal Acquisition Reg. 52.233-1 (Apr. 1984).

[3] T.E. Deloss Equipment Rentals, ASBCA No. 35374, Jan. 13, 1988.

[4] John McCabe, ASBCA No. 35717, January 14, 1988 citing Apex International Management Services, Inc., ASBCA No. 34578, 10 Dec. 10, 1987.

involved".[5] If the two parts of the contractor's claim are not "intertwined", the ASBCA will consider each matter separately. Because the contractor's invoice is for two entirely separate matters, you should consider each of the contractor's claims separately. As both parts are under $50,000.00, neither part must be certified. Consequently, the contractor is due CDA interest on the "added work" portion of its claim.

[5] Sol-Mart Janitorial Services, Inc., ASBCA No. 32873, 87-3 BCA para. 20,120.

Clerk of Court Note

Civilian Witnesses for Overseas Trials.

Evidence is mounting that many trial and defense counsel overseas are unfamiliar with paragraph 18–16.1 of Army Regulation 27–10. That paragraph governs obtaining the help of the Clerk of Court in producing civilian witnesses from CONUS for appearance in investigations and trials overseas.

One of the most important requirements is that of two weeks' notice before the desired arrival date. This is not solely for the convenience of the Clerk of Court's office, where manpower constraints have limited the manning for this particular function to one employee. It also is for the benefit of the prospective witness, who often must make arrangements with family and employer for an overseas trip. It is not by accident that the governing paragraph was placed in the *Victim/Witness Assistance* chapter of the regulation.

There also are cogent reasons why the Clerk's office needs more notice than the inadequate three or four days we often receive. If the witness does not have a passport, we must add two days to the normal travel time so that the witness can have a full day to obtain a passport in one of the en route cities where we have had success obtaining passports rapidly for persons on government business. Remember, however, that the witness without a passport may also be without a *certified* birth certificate. Those certificates are obtained, usually by mail, from state agencies that cannot be rushed.

Another complication arises when the witness cannot afford the passport fee, transportation to the departure airport (which can be some distance from home), or the overnight stay to obtain a passport en route. An advance of funds may be required. If so, we inform the jurisdiction and the fund citation is amended to authorize an advance. A fund citation is not, however, a negotiable instrument; the witness must go to a military finance office to obtain the money. Result: Still more travel time required.

Even the initial contact with the witness can be time-consuming. The telephone number you give us often is not the daytime phone. When we can't reach the witness right away by telephone, we send a message asking the witness to telephone us collect. As this is being written, we have learned that there is some new restriction on sending messages through our military message center to civilian addresses. By the time you read this, either we will have overcome this seeming obstacle to rapid communication or you will have heard about it further through a more official communication.

Now that we have shared some of our problems with those of you in the jurisdictions needing the witnesses, it is your turn to share your problems with us: So lax has become compliance with the standards of paragraph 18–16.1 of AR 27–10, we must ask you to give some explanation when your witness request cannot comply with its provisions. Understanding your problems may enable us to support you better.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

Confrontation and Memory Loss

In *United States v. Owens*,[1] the Supreme Court addressed the constitutional significance of a hearsay declarant's memory loss. The confrontation clause of the sixth amendment gives an accused the right to be confronted with the government's witnesses. Implicit in this confrontation right is the right to an adequate opportunity to cross-examine these adverse witnesses.[2] Before *Owens*, The Court had never found that an accused's confrontation rights were violated because of a witness's loss of memory.[3] In *Owens*, however, the Court held that the confrontation clause is not

[1] 108 S.Ct. 838 (1988).

[2] *See* Mattox v. United States, 156 U.S. 237 (1985); California v. Green, 399 U.S. 149 (1970); United States v. Clay, 1 C.M.R. 74 (C.M.A. 1951).

[3] *Owens*, 108 S.Ct. at 841. Whether a witness's memory loss deprived an accused of rights under the confrontation clause was specifically left open by the Supreme Court in *California v. Green*, 399 U.S. 149 (1970).

violated by the admission of a prior out-of-court identification statement of a witness who is unable, because of memory loss, to explain the basis for the identification.[4]

The Case

The facts in *Owens* were not disputed. On April 12, 1982, John Foster, a correctional counselor, was attacked and brutally beaten with a metal pipe. His skull was fractured, and he remained hospitalized for almost a month. As a result of his injuries, Foster's memory was severely impaired. While Foster was hospitalized, an FBI agent visited Foster on two occasions. On the second visit, Foster picked Owens out of a mug book as his assailant. At trial, Foster could only remember being struck in the head and seeing blood on the floor. He testified, however, that he clearly remembered identifying Owens as his assailant during the hospital visit of the FBI agent.[5] On cross-examination, Foster admitted that he could not presently recall seeing his assailant at the time of the attack. Moreover, Foster testified that, although he received numerous visitors in the hospital, the visit of the FBI agent was the only visit he could recall. Trial evidence indicated that while hospitalized, Foster also identified another person as his assailant. Foster had no memory of this misidentification.[6]

The United States Court of Appeals for the Ninth Circuit reversed the conviction.[7] Noting that Foster's memory loss deprived the accused of cross-examination into the underlying basis of Foster's identification, the Ninth Circuit ruled that the out-of-court identification evidence violated Federal Rule of Evidence[8] 801 (d)(1)(C). The court also found that the identification evidence violated Owen's sixth amendment confrontation right.[9] Accordingly, the court reversed after finding that Foster's complete memory loss precluded effective cross-examination.[10] The Supreme Court reversed. Though the Court characterized Foster's memory loss as actual and complete, it found that Owens was afforded an opportunity for effective cross-examination.[11]

The Rationale

The Supreme Court based its decision on *Delaware v. Fensterer*.[12] In *Fensterer*, the Court determined that the confrontation clause was not violated when cross-examination of an expert was hindered because the expert could not recall the basis of his expert opinion.[13] The *Fensterer* Court had reasoned that the confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way the defense might wish.[14] Accordingly, the *Owens* Court concluded that the opportunity for effective cross-examination was not denied when a witness testified to his current or past belief, but was unable to recall the underlying reason for that belief.[15]

Cross-examination of a witness who has suffered a memory loss can highlight obvious weaknesses in the evidence that could result in an acquittal.[16] While an attack on a witness with a poor memory may not bring success, the defense has a complaint. The Constitution does not guarantee successful cross-examination.[17] The *Owens* Court concluded that there was no confrontation problem because the traditional protections of the oath, cross-examination and the opportunity to observe the demeanor of adverse witnesses satisfy the constitutional requirements.[18]

Rule 801(d)(1)(C)

The lower court found that Foster's out-of-court identification statement did not fall under Rule 801(d)(1)(C) because Foster was not subjected to cross-examination, as the rule required.[19] The Ninth Circuit found the rule violated because Foster's memory loss prevented effective cross-examination.[20] The Supreme Court, however, stated that a witness is subject to cross-examination when the witness is placed on the stand, placed under oath, and responds willingly to questions.[21] These requirements were met in *Owens*, where Foster, to the best of his ability, willingly answered questions after being placed on the stand under oath.[22] An eyewitness, therefore, can still be subject

---

[4] *Owens*, 108 S. Ct. at 845.

[5] *Id.* at 841.

[6] *Id.*

[7] United States v. Owens, 789 F.2d 750 (9th Cir. 1986).

[8] *Id.* at 763. Fed. R. Evid. 801(d)(1)(C) is identical to Mil. R. Evid. 801(d)(1)(C).

[9] *Owens*, 789 F.2d at 763.

[10] *Id.*

[11] *Owens*, 108 S. Ct. at 845.

[12] 474 U.S. 15 (1985); *see Owens*, 108 S. Ct. at 842.

[13] 474 U.S. at 21–22.

[14] *Id.* at 22.

[15] *Owens*, 108 S. Ct. at 842.

[16] *Id.* at 842.

[17] *Id.* at 843. The Court noted that the goal of many cross-examinations is to show a loss of memory. The defense may be able to destroy the force of the prior statement by showing a loss of memory. *Id.*

[18] *Id.* at 843; *see also* California v. Green, 399 U.S. 149, 158–161 (1970). The *Owens* court specifically rejected any requirement that out-of-court statements of identification be examined for "indicia of reliability." *Id.*

[19] *Owens*, 789 F.2d at 752. Rule 801(d)(1)(C) requires that the declarant be subjected to cross-examination before the out-of-court statement of identification is admissible. The Ninth Circuit found that the right to cross-examination under Rule 801(d)(1)(C) included the right to cross-examine into the basis of the out-of-court identifications. *Id.*

[20] *Id.*

[21] *Owens*, 108 S. Ct. at 844.

[22] *Id.* at 841.

to cross-examination even if that eyewitness has suffered a loss of memory.[23]

The Court's holding is consistent with the intent that underlies Rule 801(d)(1)(C). The premise for Rule 801(d)(1)(C) is that, given adequate safeguards against suggestiveness, out-of-court identifications are generally preferrable to in-court identifications.[24] The commentators recognize that as time passes, a witness's memory fades.[25] Because an eyewitness has a better memory at the time of most out-of-court identification procedures, the identification made out-of-court is more reliable than the in-court identification.[26] Rule 801(d)(1)(C) was enacted to solve a problem like the one presented in *Owens*. The victim experienced a progressive deterioration of memory, and the out-of-court identification would have been more reliable than any in-court identification.[27]

Conclusion

The *Owens* decision is significant for the military practitioner. After *Owens*, cross-examination under Mil. R. Evid. 801(d)(1)(C) is satisfied when the eyewitness is placed on the witness stand, placed under oath, and responds willingly to questions.[28] More importantly, a loss of memory, which often impairs a cross-examination, will not cause cross-examination to be deficient under Rule 801(d)(1)(C).[29] Finally, an eyewitness's actual and complete memory loss will not deprive an accused of sixth amendment confrontation rights.[30] The decision can also be applied to other hearsay exceptions. Following a strict reading of this opinion, hearsay statements of a testifying witness may be admissible.[31] If the witness is subject to cross-examination concerning the out-of-court statements, the *Owens* decision mandates the admission of the hearsay without any further constitutional analysis.[32] Major Mason

Post-Trial Submissions by the Accused—A New Requirement for the Staff Judge Advocate

The convening authority is the military accused's first step in the appellate ladder.[33] In taking this first step, the accused has two primary methods to apply for relief, depending on the level of court-martial and the sentence adjudged. These are set forth in Rules for Courts-Martial 1105 and 1106.[34]

Under R.C.M. 1105, after a sentence is adjudged in *any* court-martial, the accused may submit matters to the convening authority.[35] It may be anything in writing that might reasonably tend to affect the convening authority's action as to findings and sentence.[36] R.C.M. 1105(b) sets forth examples of what may be submitted, which include both legal and equitable matters; they are not limited to matters presented or raised during the court-martial.[37] As a general rule, although these matters are brought to the attention of the convening authority, there is no requirement that the staff judge advocate (SJA) respond unless a post-trial recommendation is prepared and the accused raises an allegation of "legal error" that occurred at trial.[38]

The staff judge advocate must prepare a post-trial recommendation in all general courts-martial where there is a finding of guilty and in all special courts-martial where a bad conduct discharge is adjudged.[39] Under R.C.M. 1106(f)(4), the defense also has a right to submit matters in response to the post-trial recommendation.[40] The defense response may be anything in writing that responds to matters in the recommendation believed to be erroneous, inadequate, or misleading; it may also comment on any other matter.[41] There is no requirement in the Manual for Courts-Martial for the staff judge advocate to respond to matters submitted in the defense response to the post-trial recommendation. Problems arise, however, when the defense response to the post-trial recommendation (under R.C.M. 1106(f)(4)) asserts legal errors in the trial and not errors in the post-trial recommendation. Does the staff

---

[23] *Id.* at 844.

[24] *Id.*

[25] M. Graham, Evidence: Text, Rules, Illustrations & Problems 113 (2d ed. 1988).

[26] *See* Gilbert v. California, 388 U.S. 263 (1967). The Court in *Gilbert* stated that "the earlier identification has greater probative value than an identification made in the court room after the suggestions of others and circumstances of the trial may have intervened to create a fancied recognition in the witness' mind." *Id.* 273 n.3.

[27] *Owens*, 108 S. Ct. at 844.

[28] *Id.*

[29] *Id.*

[30] *Id.* at 843.

[31] *Id.*

[32] *Id.* The Court rejected any requirement to examine the hearsay statements of a testifying witness for "indicia of reliability," as required in *Dutton v. Evans*, 400 U.S. 74 (1970). *See also Ohio v. Roberts*, 448 U.S. 56 (1980). In rejecting this approach the Court stated the following: "We do not think such an [examination for indicia of reliability] is called for when a hearsay declarant is present at trial and subject to unrestricted cross-examination." *Id.*

[33] United States v. Wilson, 9 C.M.A. 223, 26 C.M.R. 3 (1958).

[34] Manual for Courts-Martial, United States, 1984, Rules for Courts-Martial 1105 and 1106 [hereinafter R.C.M.].

[35] R.C.M. 1105(a).

[36] R.C.M. 1105(b).

[37] *Id.*

[38] R.C.M. 1106(d)(4).

[39] R.C.M. 1106(a).

[40] R.C.M. 1106(f)(4).

[41] R.C.M. 1106(f)(4).

judge advocate have to respond to this assertion of legal error despite its mislabeling? The Army Court of Military Review said yes in *United States v. Thompson.*[42]

In *Thompson*, two days after being served with the post-trial recommendation, the defense counsel submitted a document entitled "Response to Post-Trial Review."[43] In that document, the defense raised a legal error from the trial concerning accomplice testimony. The staff judge advocate made no response to this allegation and, five days later, the convening authority took initial action on the case.[44] On appeal, the accused alleged that the staff judge advocate failed to respond to the legal error raised by the defense in their post-trial submissions. The Army Court of Military Review in *Thompson* agreed.

The court noted that defense counsel's response was ambiguous, it was clear that it discussed a legal error affecting the findings.[45] Therefore, the court believed it was appropriate that the staff judge advocate respond, in an addendum to his post-trial recommendation, as to whether corrective action on the findings was needed.[46]

This decision places a new requirement on the staff judge advocate.[47] If the accused raises any "legal error" from the trial during the response to the post-trial recommendation, whether it is labeled as an R.C.M. 1105 or 1106 submission, it forces the staff judge advocate to prepare an addendum to the post-trial recommendation to express his or her view as to the need for corrective action.[48] Moreover, care must be taken in the preparation of this supplemental response because, if "new matters" are raised, the addendum must once again be served on the trial defense counsel.[49] A mere discussion of the defense counsel's submissions or the need for corrective action, however, should not create this requirement.[50] Major Williams.

Article 15 Film Available

The Department of the Army has available for use a film entitled "Article 15 — Nonjudicial Punishment." This 30-minute film illustrates nonjudicial punishment rules and procedures by dramatizing three cases involving soldiers offered punishment under Article 15. Judge advocates should find the film particularly useful in teaching nonjudicial punishment to commanders. Unfortunately, the film does not cover some of the most recent changes in nonjudicial punishment (e.g., summarized Article 15's, the new filing rules for first term soldiers, and the special rules governing the imposition of nonjudicial punishment on Reserve Component personnel); accordingly, local instruction should be provided to supplement the film. If you are interested, a copy of the film can be obtained through any Army visual information library. Its SAVPIN number is 067923. The film is **not** available through The Judge Advocate General's School.

Administrative and Civil Law Notes

Recent Changes in Accommodation of Religious Practices

In response to *Goldman v. Weinberger*, 475 U.S. 503 (1986), Congress passed legislation requiring the Armed Services to allow soldiers to wear religious apparel while in uniform, except when the Secretary concerned determines: (1) that the wearing of the item would interfere with the performance of the member's military duties, or (2) that the item of apparel is not neat and conservative. Defense Authorization Act of 1988 and 1989, Pub. L. No. 100–180, § 508, 101 Stat. 1087 (1987) (to be codified at 10 U.S.C. § 774).

On March 30, 1988, the Army released an updated version of Army Regulation (AR) 600–20 that modifies Army policies and procedures to conform to the new requirements.

The change to AR 600–20 includes the following guidance for commanders and soldiers:

(1) "Religious apparel" are articles of clothing worn as part of the observance of the religious faith practiced by the soldier.

(2) "Neat and conservative" items are discreet in style and design; subdued in brightness and color, they do not replace or interfere with the proper wearing of any prescribed article of the uniform, and are not temporarily or permanently affixed or appended to any prescribed article of the uniform.

(3) Whether an item interferes with a soldier's military duties depends on the item's effect on: the operation of weapons or equipment, the health and safety of the wearer or others, and the operation of special or protective clothing or equipment.

Denials are automatically reviewed through the chain of command to Headquarters, Department of the Army. Any commander in the chain may grant an accommodation. During the appeal, soldiers must obey orders prohibiting the wear of the apparel.

Final authority to approve or disapprove denials rests with The Committee for the Review of the Accommodation of Religious Practices Within the U.S. Army. Captain Garver.

---

[42] *United States v. Thompson*, ACMR 8700631 (28 Mar. 1988 A.C.M.R.).

[43] *Id.* This title is incorrect, as there is no longer a post-trial review, but a post-trial recommendation.

[44] *Id.*

[45] *Id.*, slip op. at 3.

[46] *Id.*

[47] The author recognizes that this opinion is by a single panel of the Army Court of Military Review. Moreover, even if the SJA fails to respond to defense submissions, that failure may be tested for prejudice before corrective action is taken. *United States v. Ghiglieri*, 25 M.J. 687 (A.C.M.R. 1987). *But see United States v. Smart*, 21 M.J. 15 (C.M.A. 1985).

[48] R.C.M. 1106(f)(4).

[49] R.C.M. 1106(f)(7).

[50] *See* R.C.M. 1106(f)(7) discussion.

New Prohibition Against Active Participation in Extremist Organizations

The March 1988 update of Army Regulation (AR) 600–20 contains prohibitions and guidance on the participation by soldiers in the activities of extremist organizations. AR 600–20, para. 4–12. These restrictions are based on the policy set out in Dep't of Defense, Directive No. 1325.6, Guidelines for Handling Dissent and Protest Activities Among Members of the Armed Forces, para. III G, (Sept. 12, 1969), *as changed by* Dep't of Defense, Systems Transmittal No. 1325.6 (Ch. 2, 8 Oct. 1986).

Soldiers are required to reject participation in organizations that espouse supremacist causes, attempt to create illegal discrimination, or engage in efforts to deprive individuals of their civil rights. Passive activities, though strongly discouraged, are permitted. Examples of passive activities include: mere membership, receiving literature in the mail, and presence at an event.

Active participation is prohibited. Examples of prohibited participation include: organizing, leading, or training such a group; participating in public rallies or demonstrations; knowingly attending a meeting or activity while on duty, in uniform, in a foreign country, or in violation of an off-limits order; fundraising or recruiting; distributing literature on or off the installation; and any participation in violation of regulations, constituting a breach of law and order, or likely to result in violence.

The regulation lists a range of actions that commanders may take in response to such activity and urges coordination with the Staff Judge Advocate. Captain Garver.

Termination of the Army Domestic Action Program

The Department of the Army Domestic Action Program (DADAP) has been cancelled and Dep't of Army, Reg. No. 28–19, Department of the Army Domestic Action Program (13 Mar. 1975) is rescinded. The termination was announced in Dep't of Army Message 301333Z Apr 87, subject: Army Regulation 28–19, with change 1, dtd 31 January 1977 (Department of the Army Domestic Action Program). This message was addressed to the major command level only.

The program was geared to support projects that benefitted the disadvantaged of the civilian community. It was terminated because of perceived abuses in the types of support justified in reliance on it.

Recognizing that some commands desire to continue their domestic action programs, the message suggests that regulations or directives may be developed to address command policy in this area. Army guidance is as follows: No Department of Defense (DOD) funds may be used to support non-DOD organizations or activities unless specifically appropriated, or the support is incidental to a legitimate DOD function such as training.

The message lists criteria that local regulations should adopt for evaluating requests for support:

(1) Does the support fulfil valid training requirements?

(2) Is the support requested by responsible local officials?

(3) Have potential commercial, state, or local sources of support been exhausted or are they not reasonably available? Unfair competition with commercial sources of support must be avoided.

(4) Will the support impair mission accomplishment?

(5) Are the soldiers providing the support performing MOS-related activities? Is there a training benefit for the soldiers involved?

(6) Can the support be provided with existing funds?

The message states that requests for assistance from private organizations are addressed in other directives. In that regard, commanders should consult Dep't of Army, Reg. No. 700–131, Logistics—Loan and Lease of Army Materiel (4 Sep. 1987). Dep't of Army, Reg. No. 360–61, Army Public Affairs—Community Relations (15 Jan. 1987) also authorizes limited participation in certain community events. Captain Garver.

Legal Assistance Items

The following articles include both those geared to legal assistance officers and those designed to alert soldiers to legal assistance problems. Judge advocates are encouraged to adapt appropriate articles for inclusion in local post publications and to forward any original articles to The Judge Advocate General's School, JAGS–ADA–LA, Charlottesville, VA 22903–1781, for possible publications in *The Army Lawyer.*

Consumer Law Notes

National Consumers' Week

I confess that somehow I let National Consumers' Week, April 24–30, 1988, get by without alerting you to all the festivities. Sadly, I was not even aware of the celebration until I read about it on my fast-food restaurant's paper place mat. Notwithstanding the tardiness of this announcement, I thought I would note the event because my place mat conveyed six consumer tips that could form the basis for your next preventive law class. These timeless tips are:

1. Don't sign anything before you read and understand it.

2. Don't buy anything or give your credit card number over the phone unless *you* have made the call.

3. Always ask questions before joining health spas, buying campground memberships, or donating to charities.

4. Get more than one estimate for home improvements and car repairs.

5. If you buy a new car, ask about the "Lemon Law." If you buy a used car, ask for the "Buyer's Guide." And, my personal favorite,

6. If the deal sounds too good to be true, it probably is. Major Hayn.

Telemarketing Fraud Continues

There is some good news and some bad news regarding telemarketing fraud. The bad news is that telemarketing fraud continues. For example, the Oklahoma attorney general has filed a petition alleging that USA Promotions and Oklahoma Dialing for Dollars are violating the Oklahoma

Consumer Protection Act by promising a free trip to Hawaii or London, a "professional type" camera, and other "gifts" if the consumer will buy a package of film processing services for $49.95. In reality, the petition alleges, consumers must pay additional sums to out-of-state companies in order to receive anything.

The good news is that punishing those who engage in telemarketing fraud may become easier. In March 1988, the National Association of Attorneys General passed a resolution supporting the creation of a federal statute that would enable the attorneys general to proceed in federal court against fraudulent telemarketing operations. Among other things, the envisioned statute would enable many attorneys general to join in a single proceeding to stop fraudulent telemarketers operating in numerous states, reducing the magnitude of fraudulent operations estimated to cost American consumers $1 billion annually.

Montgomery Ward's Advertising Practices Modified

The Kansas attorney general has announced that the Montgomery Ward Company has signed a consent agreement that requires the company to change its advertising practices in that state. The agreement was based on an investigation of Ward's advertisements from January 1, 1987, through October 17, 1987, which revealed, for example, that a pair of swivel rockers was offered at the regular price of $459.98 for only 102 days of the 290-day period, being offered at a sale price of $299 a pair on the remaining 188 days during this period.

The attorney general alleged that stating that an item is on sale when the advertised price is the item's most prevalent price is a deceptive and misleading advertising practice in violation of the Kansas Consumer Protection Act. Pursuant to the consent agreement, Wards will pay restitution to Kansas consumers who purchased the swivel rockers during 1987 at the "regular" price. The restitution will be the difference between the price paid and the lowest advertised price. In addition, Wards will pay $5,000 in civil penalties and $10,000 investigation fees.

Social Security Cards Sold

The Oregon attorney general has announced a $25,000 settlement in a lawsuit against a Washington business using Oregon locations to solicit application fees for Social Security cards from consumers in California, New York, Illinois, Kansas, and other states. The complaint alleged that representatives of the defendant company either said or implied in mail solicitations that they were agents of the federal government and that they would process card applications for a fee. The company had allegedly processed 104,500 direct mail solicitations between October 20 and November 30, 1987, and between 70 and 300 people per day had sent $10 or more to obtain cards when the operation was closed by a temporary restraining order on December 7, 1987. In fact, the company's representatives were not agents of the Social Security Administration and had no authority to issue Social Security cards.

A Cure for Cancer, AIDS, and Other Diseases

On February 25, 1988, the Texas attorney general filed a suit against the San Antonio Universal Life Church and its minister, Edward Paul Dusha, alleging that Dusha illegally sold drugs, solutions, and herbs, falsely claiming that these potions could cure medical ailments including cancer, AIDS, leukemia, arthritis, herpes, hemorrhoids, ringworm, ulcers, and flu, and that these drugs would restore youth and return one to "sex normalcy." Laboratory analysis revealed that some of the pills, which sold for $60 for 100 tablets, contained procaine hydrochloride, a prescription drug under the Texas Dangerous Drug Act. The attorney general is asking the court to order payment of civil penalties of $2,000 per violation, to require refund of all money illegally taken from consumers, and to prohibit the defendants from illegally selling drugs and from engaging in deceptive business practices.

Vehicle Lessors and Lessees May Not Be Protected by State Lemon Laws

In *Industrial Valley Bank & Trust v. Howard*, 368 Pa. Super. 263, 533 A.2d 1055 (1987), the Superior Court of Pennsylvania has recently held that neither the lessor nor the lessee of an automobile qualifies as a purchaser within the meaning of the Pennsylvania "lemon law." Although the defendant, Howard, had originally entered into the leasing arrangement with a dealer for the lease of a vehicle for a five-year term, the dealer subsequently assigned the lease to the plaintiff, Industrial Valley Bank & Trust Company (IVB). Howard later returned the car because it was allegedly defective. IVB filed a complaint against Howard alleging that, because Howard had returned the car prior to the completion of the lease term, he was in default according to the terms of the lease.

Howard filed a counterclaim alleging that IVB had breached its agreement as lessor because it had failed to exercise its rights under the Pennsylvania lemon law to file an action against the manufacturer. The superior court agreed with the lower court's denial of Howard's counterclaim, noting that under the Pennsylvania lemon law the right to bring an action rests with "purchasers." 73 Pa. Cons. Stat. § 1958 (Supp. 1987).

According to the statute, a purchaser is:

> A person, or his successors or assigns, who has obtained ownership of a new motor vehicle by transfer or purchase or who has entered into an agreement or contract for the purchase of a new motor vehicle which is used or bought for use primarily for personal, family or household purposes.

73 Pa. Cons. Stat. § 1952 (Supp. 1987). The court found that, when a vehicle is leased by the consumer rather than purchased, neither the lessee nor the lessor qualifies as a purchaser within the meaning of the statute, since the lessor retains legal possession but does not use the vehicle for the required purposes, and the lessee, who is using the vehicle for the required purposes, did not purchase the vehicle. The court consequently held that because neither the lessor nor the lessee is a purchaser, neither has a right to bring a cause of action under the Pennsylvania statute.

Your B.A. is B.A.D. for Your Credit Rating

Had you almost convinced yourself that your B.A. was as good as your buddy's engineering degree? Did your friends say that your insecurity was just paranoia? Yes? They were wrong! Representative Kleczka (D. Wis.) recently introduced into congress a measure to amend the Equal

Credit Opportunity Act, 15 U.S.C. § 1691 (1982), to prohibit refusal of credit to an individual based on that person's course of study. The bill addresses concerns that certain major credit institutions have adopted a policy of denying credit cards to liberal arts majors, while providing credit cards to business and engineering majors. The bill has been referred to the House Committee on Banking, Finance, and Urban Affairs.

Tax Note

Trial Court Lacks Authority to Order Parent to Waive Child Dependency Exemption

Do state courts have jurisdiction to determine which party to a divorce can claim the dependency exemption for a child? The Michigan Court of Appeals recently ruled that a state court cannot order a custodial parent to give up the right to the federal income tax dependency exemption for a child. *Lorenz v. Lorenz,* 144 Mich. App. 722, 375 N.W.2d 800 (1988).

Before 1985, the custodial parent was entitled to claim the dependency exemption for a child, subject to two exceptions. Under the first exception, the noncustodial parent could claim the exemption if he or she provided over $600 per year of support for the child and the divorce decree or separation agreement stated that the noncustodial parent was entitled to the deduction. The other exception allowed the noncustodial parent to claim the exemption if he or she provided over $1,200 per year of support and the custodial parent could not establish that he or she provided more. I.R.C. § 152(e)(2)(B) (1984).

The 1984 Tax Reform Act amended the Tax Code to provide that the child of divorced taxpayers will be treated as the dependent of the custodial parent. I.R.C. § 152(e)(1)(West Supp. 1988). The new law, however, permits the custodial parent to release the claim for the exemption in any year. This release must be in writing and attached to the noncustodial parent's return. I.R.C. § 152(e)(1)(A)(West Supp. 1988).

Several courts have held that the new rules do not preclude a court from ordering a custodial parent to relinquish the right to the exemption by executing the required written waiver. *See, e.g., Fundenberg v. Molstad,* 390 N.W.2d 19 (Minn. Ct. App. 1986); *Corey v. Corey,* 712 S.W.2d 708 (Mo. Ct. App. 1986). The Michigan Court in *Lorenz,* however, held that the 1984 amendment to the Code divested state courts of jurisdiction over which party could take the exemptions. The Texas Court of Appeals is the only other state court to come to a similar conclusion. *Davis v. Fair,* 707 S.W.2d 711 (Tex. Ct. App. 1986).

The court in *Lorenz* also held that the trial court erred by refusing to entertain a motion brought by the noncustodial parent to reduce support payments in light of the fact that loss of the dependency exemptions would increase his taxes. According to the court in *Lorenz,* trial courts have discretion to modify a support order due to a changed financial status resulting from the loss of a dependency exemption.

Legal assistance attorneys representing separating clients can avoid future litigation simply by drafting separation agreements specifically addressing who will be entitled to the dependency exemption. Although counsel representing noncustodial parents could be making a serious mistake by ignoring the issue and relying on a court to resolve it, the parent can nevertheless obtain some relief by seeking a modification in the amount of the support payments to offset the increase in tax liability. Major Ingold.

Professional Responsibility Note

JAG Officer Justified in Making Disclosures of Sexual Abuse by Client's Husband

The U.S. District Court for the District of Maine recently dismissed a civil action under the Federal Tort Claims Act based upon an Air Force lawyer's alleged breach of the attorney-client privilege by revealing information about the client's husband's sexual molestation of their son. (*Chesky v. United States,* Civil No. 85–0478–B (D. Maine Mar. 1, 1988)). The client sued the United States, claiming that the lawyer's disclosures were the sole cause of her divorce from her husband, his less than honorable discharge from the Air Force, and her loss of military benefits.

The plaintiff filing the suit initially consulted the Air Force lawyer to find a way to separate her son from her husband. Although the plaintiff told her attorney that she did not want her husband to be jailed or lose his career, she agreed that the lawyer should contact her husband's commanding officer. The plaintiff also did not object when the lawyer also called the Maine Department of Human Services and she later freely discussed her husband's incestuous conduct with Department social workers.

The district court held that the lawyer's conduct violated neither the Maine Bar Rules nor the ABA Code of Professional Responsibility, which governs the conduct of Air Force lawyers. Although the client did not give her written consent to the lawyer to reveal a confidence or secret as is contemplated under Maine Bar Rule 3.6(1)(1), the court determined that the client's agreement to release the information was sufficient consent under established principles relating to the waiver of the attorney-client privilege.

The court also questioned whether, under these circumstances, an attorney-client privilege attached to the disclosures. The client came to the attorney for the purpose of obtaining assistance in protecting her son. There was no way, the court concluded, for the attorney to help her obtain this result without disclosing the communications.

Unlike the Maine Bar Rules, the new Rules of Professional Conduct governing Army lawyers do not require that consent to reveal a client's confidence be in writing. Dep't. of Army, Pamphlet No. 27–26, Rules of Professional Conduct for Lawyers, rule 1.6 (Dec. 1987) [hereinafter Army Rules]. If a conflict between the new Army rules and the rules of professional conduct in the state in which an Army attorney is licensed exists, the attorney should comply with the Army rules. Army Rule 8.5. In cases like *Chesky,* however, an attorney could follow the more stringent state requirements by obtaining the consent in writing and still be in full compliance with the Army rule.

Civil suits against the United States for alleged violations of the new Rules of Professional Conduct are not likely to succeed because the preamble to the Rules provides that a violation of any rule does not give rise to a civil cause of action. Although the potential for civil liability in this area is slight, Army attorneys should nevertheless fully consult

with clients before revealing confidences to appropriate authorities. Major Ingold.

Absentee Voting

The following message, which was distributed to installation commanders, senior installation voting assistance officers, and unit voting assistance officers, may help legal assistance attorneys respond to client inquiries regarding absentee voting in the upcoming elections.

A. DA Pam 360–503, '88/'89 Voting Assistance Guide

1. Beginning with the 1988 general election, overseas voters may be eligible to use the Federal Write-In Absentee Ballot (FWAB) to vote for federal offices (President/Vice President, Senator, Representative/Delegate). The FWAB may be used only for general elections and is backup for voters who expect to be able to use the regular absentee ballot from their state or territory but who do not receive that ballot in time to vote and return it. The FWAB must be received by the local election official not later than the deadline for receipt of regular absentee ballots under state law. The FWAB is to be used to assist those voters who would be disenfranchised through no fault of their own, and is not designed as a replacement for the regular state ballot and is valid only when the state ballot has been requested. Connecticut is not required to accept a FWAB.

2. There are three conditions to using a Federal Write-In Absentee Ballot in a general election.

a) Voters must meet all the regular requirements for voting in their state of legal residence (see state guide pages in reference A). They must be eligible to vote and be registered or exempt from registration, under state law. They must comply with state laws applying to regular absentee voting such as registration or notarization requirements.

b) A voter must have requested a regular state absentee ballot early enough so that after mailing, the request is received by the appropriate local official at least 30 days before the election.

c) Voters must be overseas and have a foreign mailing address or an APO/FPO postmark.

3. State Write-In Absentee Ballot. The Federal Write-In Absentee Ballot should not be confused with a state write-in ballot which is used by several states to assist voters, such as submariners, missionaries, Peace Corps personnel, and other individuals in extremely isolated areas, who know before the election they will be unable to use their state's regular absentee voting procedures. The eligibility requirements for a state write-in differ in each state. Requirements for a state write-in ballot are set by the individual states. Specific information on state write-in ballots can be found in the various state guide pages contained in reference A. NOTE: a federal write-in absentee ballot with instructions can be found at Appendix H of reference A.

4. To better understand the use of the FWAB, a five minute video tape has been made and can be obtained by requesting tape number 505198DA, "Federal Write-In Absentee Ballot," from the audio-visual center. Recommend that all overseas voting officers view the film. This message should be disseminated down to the company level and should be maintained throughout the election year.

Dep't of Army Message 211700Z Mar 88, subject: Federal Write-In Absentee Ballot Information.

Family Law Notes

Adoption Reimbursement

Judging from inquiries from the field, Congress's recent enactment of legislation authorizing the Army (and the other Armed Forces, including the Coast Guard) to reimburse members for a portion of adoption costs appears to have attracted a great deal of interest. Unfortunately, the absence of information about the program through command channels, including legal assistance offices, has generated an equal amount of frustration for these soldiers, not to mention the attorneys who must advise them. This note reviews the legislation and the preliminary implementing guidance that was recently made available by the Department of Defense Office of Family Policy and Support [hereinafter the Family Policy Office].

Section 638 of the National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100–180, 101 Stat. 1106 (1987) [hereinafter Section 638], creates a "Test Program for Reimbursement of Adoption Expense." The measure was sponsored in the Senate by Senator Gordon J. Humphrey (R–N.H.), and in the House by Congresswoman Patricia Schroeder (D–Colo.), with the goal of evaluating whether financial adoption assistance has a cost-effective, positive effect on morale and retention. The program initially will be in effect for a two-year period, applicable to qualifying adoptions that are "initiated" after September 30, 1987, and before October 1, 1989. No special funds have been appropriated to reimburse eligible soldiers, but the Department of Defense (DOD) has been authorized to spend up to $2.8 million for the program. Thus, the money will have to be transferred from other personnel budget items.

The delay in issuing implementing directives has led some to speculate that DOD has abandoned the whole idea. This, however, is an unfounded rumor. The Family Policy Office is working diligently to develop and staff the necessary guidance, and the program may have been officially launched by the time this issue of *The Army Lawyer* reaches the field. Still, it is worthwhile to review here the statutory provisions and interim official guidance so that preliminary advice (and reassurance) to clients will not be delayed pending publication of Army regulations on the matter.

Congress has directed that military members may be reimbursed for adoption expenses up to $2,000 per child or $5,000 per calendar year (if more than one child is adopted). Prospective adoptive parents will be quick to point out that these sums do not begin to defray all the costs of adoption. While this is true, the limitation has some basis in logic. People familiar with the legislation have noted that the cost to the government for childbirth in a military hospital is roughly $2,000, and thus one aspect of the program is an equalization of military benefits between those who have children while on active duty and those who adopt instead. At any rate, these dollar limitations are statutory. Section 638(e). A further limitation provides that there can

be no reimbursement for expenses paid by any other federal, state, or local adoption assistance program. Section 638(d).

Any soldier is eligible to participate in the program. Congress provided that reimbursement shall be available for "adoption[s] by a single person." Section 638(b). On the other hand, there are restrictions on who can be adopted. The adoptee must be a child under the age of eighteen (Section 638(a)), and, according to the Family Policy Office, he or she cannot be the soldier's stepchild. This latter restriction flows from program clarifications developed between that office and congressional staffers—it does not appear in the statute. Beyond these two limitations, however, soldiers are free to adopt whom they please. The statue authorizes reimbursements for "an infant adoption, an intercountry adoption, and an adoption of a child with special needs as defined in [42 U.S.C. § 673(c)]." Section 638(b). As over half the people who have inquired about the program intend to adopt children from a foreign country (particularly Korea), this is welcome news for those likely to seek reimbursement.

Most clients have three questions: is my adoption eligible for reimbursement; if so, what expenses are reimbursable; and, how do I apply? Starting with the first of these, the adoption will qualify for the program if the following requirements are met:

—The adopted child is under 18. Section 638(a).

—The adopted child is not the soldier's stepchild.

—The adoption does not violate federal, state, or local law. Section 638(g)(2)(B).

—The adoption is arranged: by a state or local agency empowered by state or local law to place children for adoption; by a nonprofit, voluntary adoption agency that is empowered by state or local law to place children for adoption; or through a private placement (which is not in violation of applicable law). Section 638(g)(1)(A)–(C); *cf.* section 638(g)(2)(B).

—The adoption proceeding is initiated after September 30, 1987, but before October 1, 1989. Section 638(h). The Family Policy Office intends to define the term "initiated" as the date of the home study report (if any is issued) or of the child's placement in the adoptive home, whichever is later. This construction serves to maximize the number of soldiers who will be eligible for reimbursement.

The upshot of these provisions is that soldiers need not, and should not, delay starting adoption proceedings to await further directives on the reimbursement program. They can begin the adoption process now with the assurance that, as long as they comply with above guidelines, they will be eligible for this benefit. The only caveat is that they should keep careful records and all receipts related to adoption expenses.

The next question raises the issue of what expenses the program will recognize. The statute authorizes reimbursement for "qualifying adoption expenses," which are broadly defined as "reasonable and necessary expenses that are directly related to the legal adoption of a child." Section 638(g)(1). Because adoptions can cost upwards of $10,000, it is a safe bet that under this language virtually all soldiers will receive the full $2,000 per child (or $5,000 per calendar year if more than one child is adopted in the year). Still, soldiers should be mindful that some statutory clarification exists regarding the meaning of "qualifying adoption expenses."

For instance, the term does not include the adoptive parent's expense for travel outside the United States unless the travel is required by the law of the child's country of origin as a condition of a legal adoption; is necessary to qualify for adoption of the child; is necessary to assess the health and status of the child; or is necessary to escort the child to the United States or to the soldier's duty station. Section 638(g)(2)(A)(i)–(iii). Additionally, according to section 638(g)(3), the term "reasonable and necessary expenses" includes the following items:

—Public and private adoption agency fees, including fees that are charged by agencies in foreign countries.

—Placement fees, including fees for adoptive parent counseling.

—Legal fees, including court costs.

—Medical expenses, including hospital expenses for a newborn infant, for medical care furnished the child before adoption, and for physical exams for the adoptive parent(s).

—Expenses relating to the biological mother's pregnancy and to childbirth, including counseling, transportation, and maternity home costs.

—Temporary foster care charges when payment must be made immediately before the child's placement.

—Transportation expenses (except that transportation outside the United States must meet the special requirements discussed above).

As for the third question, unfortunately there is not yet any guidance on how to apply for reimbursement; this is one of the main issues that the Family Policy Office has been attempting to resolve. The matter should be settled within a few months. The delay in getting guidance to the field will have a minimal impact on most soldiers because the statute provides that no reimbursements will be made until the adoption is final. Section 638(c). In many states this will not occur until one year has elapsed after the child's placement in the home, and the program only applies to adoptions initiated after September 30, 1987. Thus, most qualifying soldiers will not be eligible for reimbursement before the latter part of 1988.

The proposed application procedure is designed to be as simple as possible, and it includes JAG involvement. DOD's preliminary concept would have an "installation legal officer" verify that the adoption initiation date is within the statutory window and that the adoption has been finalized. The soldier then submits an application for reimbursement to the installation finance office, together with the legal officer's verification and receipts to establish expenses. The installation finance office reviews these documents and certifies the reimbursement amount to the service's central finance office. The central finance office then would pay this amount to the soldier.

In conclusion, the adoption reimbursement program is alive and well. Although the absence of authoritative information has been very frustrating for all concerned, this situation should soon be remedied. The delay in reimbursement occasioned by the statutory requirement that the

adoption be finalized may cause a degree of financial hardship for some soldiers; unfortunately there is no way of expediting the process. Clients who are experiencing such difficulties should perhaps be referred to Army Community Services to inquire about a low-interest loan to tide them over until the check comes. In the meantime, the good news is that, despite rumors to the contrary, the program is operative, and the check eventually should be forthcoming.

Requests for additional guidance should be addressed to the Department of Defense, OASD (FM&P) (FSE&S), Office of Family Policy and Support, ATTN: Ms. O'Beirne, Room 3A272, The Pentagon, Washington D.C. 20301–4000. The phone numbers are (202) 697–7191 and AV 227–7191. Major Guilford.

Former Spouses' Health Care

There is now a health care insurance plan for former spouses. About four years ago Congress directed the Department of Defense to negotiate with the private insurance industry to develop a group policy that would provide guaranteed, relatively low-cost health insurance for former soldiers and former spouses who had been entitled to health care from the military but who were no longer eligible.

These negotiations have finally been fruitful. Mutual of Omaha has created the Uniformed Services Voluntary Insurance Plan to cover soldiers who leave active duty prior to retirement and former spouses who lose military health care benefits due to divorce. As might be expected, the insured's costs for medical care under this plan are higher than the costs under CHAMPUS, and the coverage is more restrictive than CHAMPUS as well. Still, the plan provides reasonable insurance protection at a group rate below that charged for a standard individual insurance plan. An additional benefit of the plan is that qualified persons who submit timely applications will be insured regardless of current health conditions.

The insurance is not cheap, and the government will not pay any part of the premiums. A chart at the end of this note shows the quarterly amounts, which are based on the insured's gender, age, and smoking status. The costs are sufficiently high that counsel who represent soon-to-be former spouses may want to consider separation agreement provisions that obligate the soldier to pay at least a portion of the premiums, especially after long-term marriages. On the other hand, the basic concept behind the program is to provide temporary insurance for the former spouse (or former soldier) until he or she becomes eligible to participate in some other health care plan (for example, through employment or through a subsequent spouse); thus, those representing soldiers in divorce actions should attempt to negotiate a separation agreement provision calling for termination of the obligation when the former spouse becomes eligible for alternative health care coverage.

In counseling prospective former spouses, it is important to remember that time is of the essence. The guaranteed insurability provisions are operative only if the former spouse applies for coverage within 90 days of the date of the divorce decree. There are special rules, however, for 20/20/15 spouses who are entitled to "transitional health care;" they must apply within 90 days of the date their military health care benefits terminate.

Additional information on this program should be available soon through command channels. Major Guilford.

Quarterly Premiums for Coverage Under the Uniformed Services Voluntary Insurance Plan

	Non-smokers		Smokers	
Age	Male	Female	Male	Female
18–29	$173.49	$230.19	$192.78	$255.75
30	173.49	252.12	192.78	280.14
31	173.49	259.32	192.78	288.12
32	175.29	266.61	194.76	296.22
33	181.80	276.96	201.99	307.74
34	189.60	287.91	210.66	319.89
35	198.45	298.77	220.50	331.95
36	207.36	309.96	230.40	344.40
37	216.24	321.21	240.27	356.91
38	224.43	331.20	249.36	368.01
39	232.98	342.06	258.87	380.07
40	241.53	352.20	268.38	391.32
41	250.71	361.44	278.58	401.61
42	260.28	368.40	289.20	409.32
43	271.62	380.07	301.80	422.31
44	283.38	390.09	314.85	433.44
45	295.59	400.11	328.44	444.57
46	308.70	410.13	342.99	455.70
47	323.07	420.15	358.98	466.83
48	334.41	425.73	371.55	473.04
49	346.53	431.34	385.02	479.28
50	359.19	437.37	399.09	485.97
51	373.47	442.95	414.96	492.18
52	389.28	448.59	432.54	498.42
53	400.26	451.77	444.72	501.96
54	411.48	454.56	457.20	505.08
55	424.38	457.80	471.54	508.65
56	438.06	460.59	486.72	511.77
57	452.91	463.80	503.22	515.34
58	458.88	463.80	509.88	515.34
59	464.61	463.80	516.24	515.34
60	470.55	463.80	522.84	515.34
61	475.89	472.29	528.75	524.76
62	481.14	485.55	534.60	539.49
63	481.14	485.55	534.60	539.49
64	481.14	485.55	534.60	539.49
Each Child	$108.42	$108.42	$108.42	$108.42

Criminal Law Division Note

Criminal Law Division, Office of The Judge Advocate General

Search and Seizure—Situations Where the Fourth Amendment Does Not Apply: A Guide for Commanders and Law Enforcement Personnel

Major Gary J. Holland
Criminal Law Division, Office of The Judge Advocate General

This article is intended as a resource document for judge advocates when providing classes, professional development sessions and advice to commanders and law enforcement personnel. When used in connection with such purposes, judge advocates may place the information in perspective, answer questions and clarify any "gray" areas. Footnotes have been purposely omitted so that the article will better serve as a photocopy-ready resource that may be distributed to non-lawyer military personnel. For an in-depth discussion of the subject matter, the author suggests that readers refer to Dep't of Army, Pam No. 27–22, *Military Criminal Evidence* (15 July 1987); W. LaFave, *Search and Seizure, A Treatise on the Fourth Amendment* (2d ed. 1987); and recent case law. (The author is indebted to Major Wayne E. Anderson, Instructor, Criminal Law Division, The Judge Advocate General's School, U.S. Army, for the use of his teaching outline on this subject in the preparation of this article.)

Introduction

The fourth amendment to the United States Constitution states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched, and the persons or things to be seized.

The fourth amendment strictly limits the power of commanders and law enforcement personnel to make searches and seizures. Courts have indicated that the fourth amendment prefers and, in some cases, requires government officials to obtain a warrant from a neutral and detached magistrate before conducting a search or seizure. The courts have also recognized the realities of law enforcement, however, and have made exceptions to the probable cause and warrant requirements of the fourth amendment.

Some situations are not meant to be encompassed within the fourth amendment. For the fourth amendment to control a search, (a) the intrusion must be done by a government agent, and (b) the intrusion must invade the subject's reasonable expectation of privacy. Additionally, for the fourth amendment to apply to seizures of a person, the restriction on the person's liberty must be significant enough that a reasonable person would not believe that he was free to leave the presence of the one who is doing the restraining. What follows is an overview of those search and seizure situations where the courts have held that the fourth amendment does not apply.

Purely Private Searches and Seizures.

The fourth amendment protects only against governmental conduct and not against searches by private persons. If governmental law enforcement agents or private citizens acting at the direction of the law enforcement agents are not involved in the search or seizure, then the fourth amendment does not apply. Private security guards, therefore, would not be government agents unless deputized as officers of public law enforcement officials or acting at their direction.

For example, as long as a private freight carrier is not acting at the direction of a public law enforcement official, it can open a suspicious package, test the contents for illegal drugs, reseal the package and turn the package over to government agents without violating the fourth amendment. Another example would be a dependent son, on his own initiative, searching his soldier-father's room and finding illegal drugs hidden in a sock. This search would not come within the meaning of the fourth amendment because there exists no governmental action.

That the person doing the search is in the military does not necessarily mean that government action is involved. Actions by military law enforcement agencies, by the chain of command, or by persons having direct disciplinary authority over the person searched would involve government action, but a typical situation where a soldier searched his room to rid the room of his roommate's contraband would not violate the fourth amendment, unless the search was directed by law enforcement or someone in the chain of command.

Purely Foreign Searches

The fourth amendment applies only to U.S. governmental action; therefore, unless the search was conducted, instigated, or participated in by agents of the U.S. Government, searches conducted by officials of foreign governments are not within the scope of the fourth amendment.

Officials of foreign governments are not bound by the provisions of the United States Constitution. As a result, evidence seized by officials of foreign governments in their own investigation will be admissible in U.S. courts, unless the evidence was obtained as a result of subjecting the accused to gross and brutal maltreatment.

The mere presence of U.S. officials at a search conducted by foreign officials will not make the fourth amendment applicable. To involve fourth amendment protections, the U.S. officials must have conducted, instigated, or actively participated in the search. United States officials may not

circumvent the fourth amendment by using foreign police officials as a means of conducting searches that they could not legally conduct themselves. United States officials may be present at a foreign search, however, if their purpose is to simply observe, to protect American property, or to act as an interpreter.

Searches and Seizures of Abandoned Property

Government agents may search or seize any property that has been voluntarily abandoned by its owner. For the fourth amendment to apply, the person searched must have a reasonable expectation of privacy in the property that is the subject of the search or seizure. When a person voluntarily abandons property, he or she relinquishes any expectation of privacy in the property; therefore, if a government agent is lawfully entitled to be at the place where abandoned property is located, the agent may recover the property and examine its contents for seizable items. For example, while on an isolated road a police officer observes an obviously abandoned car. It would be proper to search the vehicle for contraband items. A search of one's on-post quarters after the person has checked out of them would similarly be permissible, because the person would no longer have an expectation of privacy in the quarters. Also, if while approaching an individual, a government agent noticed the individual throw something out of a window or to the ground, the agent could legally confiscate and examine the item.

Garbage

The contents of a trash or garbage container placed in a public place are not subject to fourth amendment protections. The courts have indicated that society is not prepared to accept as reasonable any expectation of privacy in trash deposited in areas accessible to the public pending the trash's collection. Thus, garbage cans located on any street curb may be searched without any authorization or probable cause.

Items Exposed to Open View and Hearing

What a person knowingly exposes to the public is not a subject of fourth amendment protection. "Open view" includes the normal, public observations about a person or his property. For example, noticing that a person has a certain tattoo, has a gold tooth, or has a specific make of automobile involves no fourth amendment implications. Neither are there fourth amendment implications in a person's voice or handwriting; therefore, it is not improper for persons to be compelled to give voice and handwriting exemplars when subpoenaed before a grand jury.

Open view should be distinguished from the "plain view doctrine," which is an exception to the warrant requirement of the fourth amendment. In open view, the searcher is located in a place in which there is no reasonable expectation of privacy and may notice seizable items; whereas, under the plain view doctrine, the searcher makes a lawful intrusion into an area where there does exist a reasonable expectation of privacy and may seize items that are recognized to be evidence or contraband. Examples of open view follow.

Searches and Seizures Within Open Fields/Woodlands.

Searches of unoccupied or undeveloped areas that lie outside the "curtilage of a dwelling" are not protected by the fourth amendment. "Curtilage" means the area around the home to which the activity of home life extends. Relevant factors in determining whether an area is within the curtilage include its distance from the home, whether it is within a fence or other enclosure that surrounds the home, the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by.

If the area is associated with residential purposes—if it is used as a backyard for example—then it is part of the curtilage and not an open field. On the other hand, the Supreme Court has held that a barn about sixty yards from a house, surrounded by a fence, but not completely closed to view and reasonably suspected of being used for illegal drug making was not within the curtilage.

An area can be an open field even though it has been fenced or posted with no trespassing signs. An area can also be an open field even if it is thickly wooded or cannot be viewed from a public vantage point.

Aerial Surveillance

Surveillance of outdoor areas from public airspace is not within fourth amendment coverage, even if the area in question is within the "curtilage of a dwelling." For example, a tall wooden fence surrounds someone's backyard and you get a tip that the residents are growing marijuana plants in the yard. Without obtaining a search authorization, you use a plane to fly over the backyard and can easily identify the plants as marijuana plants. Your observation was not a search and it may be used to obtain search and arrest authorizations for the residents.

Overheard Conversations

Listening to conversations in a conventional manner is not a search within the meaning of the fourth amendment even if the purpose of the listening is to gain evidence against the speaker. A person has no reasonable expectation of privacy in his or her verbal conversations with others. The speaker assumes the risk that the conversation will not be kept private and that the conversation may be overheard by the use of a person's normal, unenhanced sense of hearing. Therefore, if you are in a place in which you are lawfully entitled to be and overhear a person's incriminatory remarks, no violation of the fourth amendment occurs.

[NOTE: Special rules exist for the interception of conversations by use of *wiretaps, electronic surveillance* and *pen registers*. Because their use involves the fourth amendment, statutory or regulatory implications, you should consult Army Regulation 190–53 before employing such devices. Although the Supreme Court has held that pen registers (devices which record the telephone numbers which have been dialed from a certain telephone) do not "intercept" the contents of a conversation and are not protected by the fourth amendment, Army Regulation 190–53 establishes certain procedural prerequisites, to include obtaining express authorization, prior to the use of pen registers.]

Examination of the Exterior of Vehicles

Where a vehicle is situated at a location so that it is readily subject to observation by members of the public, no fourth amendment interest is violated by government officials looking at the exterior of the vehicle. Courts have held that observing the exterior of a vehicle parked on a street, in a parking lot, or some other public location does not constitute a search. It is also permissible to take photographs of a vehicle in such situations. Courts have also indicated that there exists no reasonable expectation of privacy in the vehicle identification number, especially where located to be read through the windshield of the vehicle. This is an application of the open view doctrine: a mere viewing into a vehicle from its exterior does not constitute a search. It is entirely lawful for police officers, who have a right to be where they are situated, to look, either deliberately or inadvertently, into a parked automobile and to observe what is exposed therein to open view.

Government Property

Government property may be searched without a warrant/authorization or probable cause unless a person to whom the property is issued or assigned has a reasonable expectation of privacy in the property. There is no absolute rule to determine if a person has a reasonable expectation of privacy in government property. Wall or floor lockers in living quarters issued for the purpose of storing personal possessions normally are issued for personal use, but the determination of whether or not a person has a reasonable expectation of privacy in government property, even when issued for personal use, depends on the facts and circumstances at the time of the search. Necessary questions to determine if a person has a reasonable expectation of privacy include whether the property was issued for personal use, whether there is any policy against placing personal items in the property, whether the government retained any right to enter the property, and whether the property is capable of being locked and who retained access to any keys.

The Supreme Court has held that a supervisor may search an employee's desk, if the search is reasonable and in relation to work-related misconduct, but not if the search was in connection with a criminal investigation. If the property was designed or intended to be a place free from governmental intrusion, the search of the property will most likely be protected by the fourth amendment. Before proceeding to search government property, you should consult with a judge advocate officer, but, as a general guideline, if the property was intended for personal use, fourth amendment protections normally apply.

Prison/Jail Cells

Searches of prison cells do not come within the purview of the fourth amendment. Prisoners have no legitimate expectation of privacy in their prison cells; therefore, the contents of prison cells may be searched at the direction of persons with authority over the institution.

Sensory Enhancement Devices Used During Searches.

As a general rule, utilization of devices that enhance one's senses while lawfully present at the vantage point where those senses are employed does not constitute a search under the fourth amendment.

Flashlights

Shining a flashlight to illuminate the interior of an automobile is not a search under the fourth amendment. Observation of that which is in the plain sight of a person standing in a place where that person has a right to be does not constitute a search and such observation is lawful regardless of whether the illumination is from natural light, artificial light, or light from a flashlight held by the person viewing the object.

Binoculars, Telescopes and Photographic Enlargements

The enhancement of one's ability to see by the use of binoculars or telescopes does not generally constitute a search under the fourth amendment. However, if the enhancement devices are used to look inside premises where one would expect a reasonable expectation of privacy, the observation may be a search protected by the fourth amendment. For example, a person may be justified in expecting freedom from telescopic intrusion into his home from a quarter of mile away to prevent others from learning what he or she was reading inside the home. The same analysis applies to telescopic cameras, which not only allows the observation, but records the observation by means of a photograph. Enlargements of photographs to reveal more detail has also been held not to constitute a fourth amendment search. However, surveillance of property by using highly sophisticated equipment not generally available to the public may convert the observation into a search.

Electronic beepers

If an electronic beeper (a transmitting device used for monitoring movement of objects) does no more than to aid in surveillance that could lawfully be done without intruding into a constitutionally protected area, no fourth amendment rights are implicated. For example, if a beeper is placed on an automobile to track its movement on public highways, the fourth amendment is not implicated; it would be improper, however, to monitor movement of a briefcase within one's home by the use of an electronic beeper.

Use of dogs for enhancement of sense of smell

There is no reasonable expectation of privacy in odors emanating from items of property. For example, it is permissible to use dogs to smell out illegal drugs in luggage or automobiles. Absent exigent circumstances or a search authorization, however a "sniff search" does not give you the authority to open the container to conduct the search for the drugs.

Mail Covers

There exists no fourth amendment protection in the use of mail covers. In a mail cover, information from the outside of envelopes and packages intended for a specified addressee is recorded by postal employees before the articles are delivered. This information, which includes the return address and postmark, is then given to the government agency that requested the mail cover. Such information may identify the names of conspirators or determine the location of persons sought by law enforcement authorities. Because information on the envelopes is open to public scrutiny by postal employees, the courts have held there exists no reasonable expectation of privacy in the

markings on the outside of a letter or package deposited in the mails.

Sensormatic or Similar Security Detection Systems

Sensormatic or similar security detection systems do not trigger fourth amendment protections. Various businesses currently use sensormatic detection systems, which will alert to tags on the store's merchandise if they are removed from the store. Such devices are intended to control shoplifting. Because there is no justified expectation in successful shoplifting, use of a sensormatic device does not trigger any fourth amendment concerns.

Although courts have held that the use of airport magnetometers and radiographic scanners used to detect weapons constitutes a search, they have consistently held that such searches are reasonable or are based upon consent as a part of utilizing the airlines. The same rationale would apply to the security detection devices used by the military in classified or sensitive areas.

Ultraviolet Lamps

The use of an ultraviolet lamp to determine if a person has been in contact with a particular item is not a search within the meaning of the fourth amendment. The technique of using an ultraviolet lamp involves treating "bird dog" objects (often a package of drugs or "bait" money) by dusting them with fluorescent powder or coating them with fluorescent grease and then at a later time, shining an ultraviolet light on a suspect. If the suspect handled the particular item, the light will make the hands glow where traces of powder or grease are present. The majority of courts that have ruled on this question state that the use of an ultraviolet lamp itself is not a search in the fourth amendment sense.

Duplication of Private Searches

A government official may duplicate a search that was conducted by a purely private individual without violating the fourth amendment. As explained in paragraph two above, the fourth amendment does not protect against purely private searches. Assume that a private citizen searched a container and found contraband. Even if the citizen resealed the container before notifying law enforcement personnel, a government official could legally search the container as long as the official did not exceed the invasion of privacy that had already occurred during the private search. For example, a private freight carrier opens a suspicious package, finds suspected illegal drugs, and notifies the police. Before the police arrive, however, the package has been resealed. The police may still, without violating the fourth amendment, reopen the package to the same extent that it was opened by the private freight carrier.

Destroyed Property

Property that is utterly destroyed may be freely searched because a person retains no reasonable expectation of privacy in destroyed property. When property is completely destroyed, the owner of the property has no reasonable expectation of privacy in its remains. For example, if an automobile is utterly demolished in an accident and left, albeit unintentionally, along the side of the road, government officials may freely search what is left of the vehicle. The Supreme Court, however, has held that the owners of a residence may retain privacy interests in their fire-damaged residence where large portions of the house were undamaged by the fire. The controlling question becomes whether the destruction is so devastating that no reasonable privacy interests remain in the ruins. [Note: A burning building clearly presents an exigency of sufficient proportion to render a warrantless entry reasonable to extinguish a blaze and to seize evidence that is in plain view and to investigate the causes of the fire. After a reasonable time has elapsed, however, a warrant may be required to reenter the building to do any further investigation.]

Preservation of Status Quo.

A government official lawfully present at a location may temporarily detain property or persons to maintain the status quo while executing a search authorization or investigating suspected criminal misconduct. No violation of the fourth amendment occurs when a police officer or government agent preserves the status quo by temporarily prohibiting any property or persons from leaving the scene of an investigation or authorized search. For example, if a police officer has a search authorization to search certain quarters and, upon arriving at the quarters, he finds the occupant on the front porch, he may lawfully detain the occupant and any others on the premises while the search is being conducted. The Supreme Court has held that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants at the premises while the search is being conducted.

Another common situation is when a policeman or commander come upon a room from which emanates the odor of burning marijuana. If the policeman or commander is capable of recognizing the smell as being that of marijuana, sufficient probable cause would exist to make a warrantless entry into the room and detain all personnel within the room to preserve the status quo while conducting a preliminary investigation into the circumstances of the suspected criminal misconduct or while awaiting assistance in the investigation. The temporary detention of the persons within the room or any confiscation of suspected contraband would not come within the coverage of the fourth amendment.

"Mere contact"

Merely asking a person to step aside and talk with government officials is not a seizure within the meaning of the fourth amendment. For a contact to become a seizure within the meaning of the fourth amendment, a reasonable person in the same circumstance would have to believe that he was not free to leave. A contact, therefore, does not authorize one to restrict the person's freedom of movement or to compel answers from the person. Examples of lawful contacts include questioning of witnesses to a crime or warning a person that he or she is entering a dangerous neighborhood. A "mere contact" should be distinguished from an investigatory stop wherein one has a reasonable suspicion that criminal activity is afoot. In making a contact, no reasonable suspicion is necessary; unlike an investigatory stop, however, the person is always free to leave.

Conclusion

The fourth amendment protects a soldier's reasonable expectations of privacy. Where no such expectation exists, the fourth amendment does not limit the power of government agents to search. Likewise, if an expectation of privacy exists, but it is not one that society regards as reasonable, the fourth amendment does not come into play. This article has illustrated how these principles apply in a variety of situations. Commanders and law enforcement agents who understand both the principles and their applications will find that respecting fourth amendment rights does not hamstring legitimate investigative techniques.

Claims Report

United States Army Claims Service

1987 Carrier Warehouse, Medical Care and Property Damage Recovery Report

In Fiscal Year 1987, the U.S. Army Claims Service (USARCS) and field claims offices collected over $9.0 million from carriers and warehouse firms for loss and damage to property during permanent change of station and other moves. This recovery effort topped last year's effort by more than a half million dollars and set an all-time recovery record.

Field claims offices completed recovery action when the liability was under $100. Where the liability was over $100, completed files were forwarded to USARCS for collection action. The method of monitoring the success in recovery was the ADP Report R16, that showed the amounts paid, the amounts collected by field offices, and the amounts collected by USARCS on files prepared in field offices. The respective claims office percentages were then calculated by adding local and USARCS recovery figures and dividing that figure by the total amount paid.

The 1987 rankings for CONUS and OCONUS (overseas) claims offices are divided into offices paying over $200,000 in claims and offices paying under $200,000 in claims. An additional category is for the best recovery rate among offices paying more than $1,000,000 in claims.

Certificates of Excellence signed by The Judge Advocate General have been forwarded to appropriate commanders to recognize the claims offices listed below:

a. CONUS—Over $200,000
   USA Missile Command and Redstone Arsenal
   U.S. Army Armor Center and Fort Knox
   USA Combined Arms Center and Fort Leavenworth

b. OCONUS—Over 200,000
   U.S. Armed Forces Claims Service, Korea
   U.S. Army South Command Claims Service
   V Corps, (Frankfurt Branch)

c. CONUS—Under $200,000
   USA Chemical and Military Police Center, Fort McClellan
   USA Intelligence and Security Command, Fort Monroe

d. OCONUS—Under $200,000
   21st Support Command (Pirmasens/Zweibrucken Law Center)
   1st Armored Division (Grafenwoehr Law Center)
   21st Support Command (Southern Law Center-Karlsruhe Branch)

e. Greater than $1,000,000
   USA Western Command Claims Service

The medical care and property damage recovery programs collected an additional $10.3 million during calendar year 1987. The Judge Advocate General has also recognized the top twenty CONUS claims offices with the highest recoveries in these areas. Certificates of Excellence have been forwarded to the appropriate commanders of the claims offices listed below:

a. Medical Care Recovery:
   III Corps and Ford Hood
   7th Infantry Division and Fort Ord
   USA Field Artillery Center and Fort Sill
   101st Airborne Division (AASLT) and Fort Campbell
   U.S. Army Armor Center and Fort Knox
   XVIII Airborne Corps and Fort Bragg
   U.S. Army Training Center and Fort Jackson
   4th Infantry Division (MECH) and Fort Carson
   Brooke Army Medical Center
   I Corps and Fort Lewis

b. Property Damage Recovery:
   Fort George G. Meade
   5th Infantry Division (MECH) and Fort Polk
   I Corps and Fort Lewis
   101st Airborne Division (AASLT) and Fort Campbell
   XVIII Airborne Corps and Fort Bragg
   USA Field Artillery Center and Fort Sill
   7th Infantry Division and Fort Ord
   Military Traffic Management Command-Oakland Army Base
   Military District of Washington
   1st Infantry Division (MECH) and Fort Riley

All claims offices are to be congratulated for their outstanding 1987 achievements. The total recovery effort depends on the dedication of every claims office, large and small, throughout the Army. To each of you who dedicated yourself to serving the Army and its soldiers in this Army-wide effort, we send our thanks for a job well done!

Personnel Claims Note

Priority of Article 139 Collections

When a soldier willfully damages or wrongfully takes another's property, article 139 of the Uniform Code of Military Justice permits the victim to seek restitution from the criminal offender's military pay. Often, however, an offender has no military pay from which to collect restitution by the time an article 139 claim is acted upon. One reason for this has been the low priority given article 139 collections in the sequence of collections in Table 7-9-1, Department of Defense Military Pay and Allowances Entitlements Manual (DODPM). In fact, money is collected to satisfy an offender's allotments and other voluntary deductions before money is taken to satisfy an article 139 claim.

Change 11 to the DODPM, to be effective in July or August 1988, will alter this. Article 139 collections will have priority over allotments and other voluntary deductions, which will increase the likelihood that the victim of such a crime will receive restitution.

This does not obviate the need to educate military personnel on article 139 and to speed the processing of article 139 claims. The two greatest obstacles to improved use of article 139 are the failure of commanders and law enforcement personnel to advise victims of the right to institute an article 139 claim, and the failure to process such claims to completion before an offender is court-martialed or administratively separated.

Recovery Notes

MTMC Codes of Service

To assist claims office personnel in identifying the various methods of shipping household goods and unaccompanied baggage, the following explains the various codes of service and direct procurement method that the Military Traffic Management Command (MTMC) uses for government bill of lading shipments.

Domestic Motor Van (Code 1). Movement of household goods in a motor van from origin residence in CONUS to destination residence in CONUS.

Domestic Container (Code 2). Movement of household goods in containers from origin residence in CONUS to destination residence in CONUS.

(There is no Code 3)

International Door-to-Door Container (Code 4). Movement of household goods in MTMC-approved door-to-door shipping containers (wooden boxes) whereby a carrier provides line-haul service from origin residence to ocean terminal, ocean transportation to port of discharge, and line-haul service to destination residence all without rehandling of container contents.

International Door-to-Door Container Government Ocean Transportation (Code 5). Movement of household goods in MTMC-approved door-to-door shipping containers (wooden boxes) whereby a carrier provides line-haul service from origin residence to military ocean terminal, the government provides ocean (MSC) transportation to designated port of discharge, and the carrier provides line-haul service to destination residence, all without rehandling of container contents.

International Door-to-Door Air Container (Code 6). Movement of household goods whereby the carrier provides containerization at the origin residence, surface transportation to the airport nearest origin that can provide required services, air transportation to the airport nearest destination that can provide required services, and transportation to the destination residence.

International Land-Water-Land Baggage (Code 7). Movement of unaccompanied baggage whereby the carrier provides packing and pickup at origin, surface transportation to destination, and cutting of the banding and opening of the boxes at the destination residence.

International Land-Air-Land Baggage (Code 8). Movement of unaccompanied baggage whereby the carrier provides packing and pickup at origin, transportation to the origin airport, air transportation to the destination airport, surface transportation to destination, and cutting of the banding and opening of the boxes at the destination residence.

International Door-to-Door Container—MAC (Code T). Movement of household goods whereby the carrier provides containerization at the origin residence and transportation to the designated MAC terminal. MAC provides terminal services at both origin and destination and air transportation to the designated MAC destination terminal. The carrier provides transportation to the destination residence.

International Land-Air (MAC) Baggage (Code J). Movement of unaccompanied baggage whereby the carrier provides packing and pickup at the overseas origin and transportation to the designated overseas MAC terminal. MAC provides terminal services at both origin and destination and air transportation to the designated MAC destination terminal in CONUS. The carrier provides transportation to the CONUS destination and cutting of the banding and opening of the boxes at the destination residence.

Direct Procurement Method (DPM) A method in which the Government manages the shipment throughout. Packing, containerization, local drayage, and storage services are obtained from commercial firms under contractual agreement or by the use of Government facilities and employees. Shipping containers are provided by the Government or contractors. Separate arrangements are made with a carrier for transportation. Shipments are routed thru commercial or Government-operated terminals. Separate documents are issued for each segment of the movement from origin to destination. DPM services are classified as follows:

1. Domestic: The movement of household goods or unaccompanied baggage within CONUS.

2. International: The movement of household goods or unaccompanied baggage between a point in CONUS and a point in an overseas area or between overseas areas.

Field Recovery Personnel

Each field claims office is requested to provide USARCS with the names and telephone numbers of its personnel handling the recovery portion of the personnel claims files. This information should be current as of July 1, 1988. Forward changes as they occur to keep our listing current.

Address replies to USARCS, ATTN: (JACS-PCR Mrs. Ringler).

Management Note

Let Us Hear From You

Field claims office practice is challenging and presents varied problems that require innovative solutions. US Army Claims Service welcomes hearing from claims judge advocates and claims attorneys who have encountered particularly difficult issues or situations in their claims practice. The sharing of information—and of innovative solutions—is valuable to all judge advocates and Army civilian attorneys. Articles summarizing problems, situations and solutions will be considered for publication in the Claims Report section of *The Army Lawyer*. For details regarding format, style, subject matter and length, contact the Executive, U.S. Army Claims Service.

Guard and Reserve Affairs Items

Judge Advocate Guard and Reserve Affairs Department, TJAGSA

Suggested Contents for Reserve Component Unit Libraries

The following list of volumes, broken down by military law functional areas, has been compiled by the Developments, Doctrine and Literature Department of The Judge Advocate General's School to provide Reserve Component (RC) units with a suggested reference library that should provide the RC judge advocate with the resources to answer most questions that arise in an operational law setting. Ready access to these references by the RC judge advocate will ensure the continued high quality of legal advice that the RC command has come to expect.

Functional Area	Material
Criminal Law	MCM, U.S., 1984
	Military Justice Reporters
	West's Military Justice Digest
	Shepard's Military Justice Citations
	AR 27-10 (Military Justice)
	DA Pam 27-7 (Guide for Summary Court-Martial Trial Procedure)
	DA Pam 27-9 (MJs Benchbook)
	DA Pam 27-10 (Trial and Defense Counsel Handbook)
	DA Pam 27-22 (Evidence)
	DA Pam 27-26 (Rules of Professional Conduct)
	DA Pam 27-173 (Trial Procedure)
	DA Pam 27-174 (Jurisdiction of Courts-Martial)
	DA Pam 27-XX (Crimes and Defenses)
International/ Operational Law	Foreign Military Sales Statutes
	AR 27-50 (SOF Policies)
	AR 550-1 (Political Asylum)
	AR 550-51 (Auth for Int'l Agreements)
	FM 27-10 (Agreements on the Law of Land Warfare)
	DA Pam 27-1 (Treaties Governing Land Warfare)
	DA Pam 27-162-1 (IL Vol I)
	DA Pam 27-162-2 (IL Vol II)
	TC 27-10-1 (Selected Problems in LOW)
	TC 27-10-2 (POWs)
	TC 27-10-3 (The Law of War)
	Geneva Conventions
	Protocols I and II
	UN Conventional Weapon Convention
	Hague Regulations
	Country Studies and International Agreements (per mission needs)
Contract Law	Federal Acquisition Regulation with DOD and DA Supplements (especially those portions dealing with small purchases)
	DA Pam 27-153 (Contract Law)
	AR 215-4 (Non-Appropriated Funds)
Administrative Law	AR 27-3 (Legal Assistance)
	AR 27-20 (Claims)
	AR 27-55 (Notarial Acts)
	AR 500-60 (Disaster Relief)
	AR 600-15 (Indebtedness)
	AR 600-20 (Army Command Policy and Procedures)
	AR 600-50 (Standards of Conduct)
	AR 608-99 (Support & Custody)
	AR 635-100 (Officer Separations)
	AR 635-200 (EM Separations)
	AR 735-11 (Reports of Survey)
	EM, Officer, and All Ranks Updates
	DA Pam 27-21 (Admin Law HB)
	DOD Dir 5100.46 (Foreign Disaster Relief)
	Legal Assistance Officer's Deskbook & Formbook
	All States Guides
	Army LA Info Directory
	LA Pubs listed in the Jan '86 *TAL*

Many of the volumes on the list can be requested through the U.S. Army Publication Center, DAIM-APC-BD, 2800 Eastern Boulevard, Baltimore, Maryland 21220-2896, telephone (301) 671-4335. Contact them to obtain the necessary information about ordering and any related costs.

IMA Annual Training

ARPERCEN has advised that, according to their accounting systems, FY 88 funds allocated for IMA annual training have been committed. They do not anticipate identifying any additional funds for the balance of this FY. IMA officers who are currently on orders should report for training as scheduled.

Training requests (DA 2446) were processed on a first-in basis. DA 2446's received for the balance of FY 88 will be date-stamped and prioritized by date received. If additional funds become available, orders will be published on a first-in basis. The IMA Branch at ARPERCEN will contact the command of an IMA solider to request a new start date for training, if the DA Form 2446 on hand indicates the original training start date has passed.

The Commander, ARPERCEN, is the only authority for ordering IMA soldiers to annual training. Under no circumstances should the soldier's IMA unit of assignment direct the individual to report without orders. Any soldier reporting without orders will be directed to return to home of record immediately. Costs incurred will be at the expense of the individual. Individual IMA officers with questions should contact their personnel management officer (1–800–325–4916).

Funding shortages for annual training in FY 89 are anticipated. FY 89 training requests should be submitted as early as possible, but not earlier than 1 July 1988. It is presently anticipated that funding constraints will allow only 60% of assigned IMAs to perform annual training for FY 89.

Automation Note

Automation Management Office, OTJAG

JAGC Defense Data Network Directory

There are numerous new address listings since we updated the DDN Gateway directory in the May issue of *The Army Lawyer*. The following contains all known JAGC listings. Because addresses change frequently, it may not be exhaustive. Please send corrections or additions to Office of The Judge Advocate General, ATTN: DAJA–IM, The Pentagon, Washington, D.C. 20310–2216.

Users may obtain instructions on how to use E-mail from their local DDN host computer management office. If you are sending mail from the same host computer, you need only use the username. If you are sending mail from another host computer, address it in the following manner:

MAILER!<USERNAME@HOSTNAME.ARPA>

The hostname for the DDN host computer is OPTIMIS–PENT. Don't forget, the address must include the entire username.

Office of The Judge Advocate General

Office DDN Address: DAJA_IM
Individual DDN addresses. The following individuals have addresses on the DDN host computer:

Owner	*Username*
Office: The Judge Advocate General	
OVERHOLT, MG HUGH R.	DAJA
Office: Assistant Executive	
SCHNEIDER, LTC MICHAEL	MSCHNEIDER
Office: Senior Staff NCO	
LANFORD, SGM DWIGHT	DAJA_SM
Office: Administrative	
EGOZCUE, CW3 JOSEPH	EGOZCUE
Office: Administrative Law	
BLACK, MAJ SCOTT	BLACK
CONTENTO, CPT DENISE	DAJA_AL1
HORTON, MAJ VICTOR	HORTON
HOWARD, MS CYNTHIA	CHOWARD
MANUELE, MAJ GARY	GMANUELE
MURDOCH, CPT JULIE	MURDOCH
POPESCU, MAJ JOHN	POPESCU
SMYSER, COL JAMES	SMYSER
WAGNER, CPT CARL	DAJA_ALP1
WHITE, MAJ RONALD	RWHITE
WOODLING, MAJ DALE	WOODLING
Office: Contract Law	
MACKEY, COL PATRICK	PMACKEY
MOREAU, MR ALFRED	MOREAU
SCHWARZ, MAJ PAUL	SCHWARZ
THOMPSON, MR BOB	BTHOMPSON
Office: Criminal Law	
EVANS, MS CARLENE	EVANSC
JOHNSON, MS VERONICA	JOHNSONV
Office: Information Management	
OFFICE DDN ADDRESS	DAJA_IM
COOK, MISS DEBORAH	DCOOK
HOLDEN, MAJ PHILIP	HOLDEN
ROTHLISBERGER, LTC DANIEL	DROTHLISB
Office: International Affairs	
OFFICE DDN ADDRESS:	DAJA_IA
CARLSON, MAJ LOUIS	LCARLSON
Office: Legal Assistance	
KIRBY, MS LAURA	KIRBY
Office: Litigation	
ISAACSON, MAJ SCOTT	ISAACSON
Office: Personnel, Plans, & Training	
MARCHAND, LTC MICHAEL	MARCHAND
Office: Procurement Fraud	
OFFICE DDN ADDRESS	DAJA_PF
LLOYD, CPT ROBERT	RLLOYD
MCKAY, MAJ BERNARD	MCKAY
Office: Records & Research	
BAKER, MS BARBARA	BBAKER
GRAY, MS JACKIE	GRAY
OTJAG Liason to MILPERCEN	
2461 Eisenhower Avenue	
Alexandria, VA	
Office DDN Address: TOWNS	

U.S. Army Legal Services Agency

Office DDN Address: BRUNSON@OPTIMIS-PENT.ARPA

Owner	*Username*
BRUNSON, MAJ GIL	BRUNSON
COSGROVE, MAJ C	JALS_TD
CROW, MAJ PATRICK	CROW
EMERY, SGT STEVEN	JALS_TJ
FULTON, MR WILLIAM	FULTON
GREAVES, SFC KENNETH	GREAVES
HARDERS, MAJ ROBERT	HARDERS
HOWELL, COL JOHN	HOWELLJ
ISKRA, COL WAYNE	ISKRA
JACKSON, LTC ROBERT	RJACKSON
KAPANKE, MAJ CARL	KAPANKE
KINBERG, MAJ EDWARD	KINBERG
KIRBY, COL ROBERT	RKIRBY
LYNCH, MAJ JAMES	JALS_CA2
MARVIN, MAJ DALE	MARVIN
MIEXELL, LTC JOHN	JALS_TCA
MILLER, MR LAWRENCE	JALS_IM
PERKINS, CW3 STEPHEN	PERKINS
REEVES, MS PHYLLIS	REEVES
ROBERSON, LTC GARY	JALS_GA
STOKES, MAJ WILLIAM	WSTOKES

The Judge Advocate General's School

Office DDN address: DODSON@OPTIMIS-PENT.ARPA

Owner	*Username*
BELL, MAJ DAVID	DAVIDBELL
BUNTON, SFC LARRY	BUNTON
CAYCE, CPT LYLE	CAYCE
DODSON, CPT DENNIS	DODSON
GARVER, CPT JOHN	GARVER
GUILFORD, MAJ J	GUILFORD
OLDAKER, MS HAZEL	OLDAKER
SCHOFFMAN, MAJ ROBERT	SCHOFFMAN
STRASSBURG, COL TOM	STRASSBUR
ZUCKER, LTC DAVID	ZUCKER

U.S. Army Claims Service

Office DDN Address: JACS_IMO1@OPTIMIS-PENT.ARPA

Owner	*Username*
DEBREIL, MR. LOU	DEBREIL
FREZZA, MR. ROBERT	JACS_PC
GIBB, LTC STEVEN	SGIBB
GIBB, LTC STEVEN	JACS_Z
TAITANO, CW2 ROLAND	JACS_TCO
TAITANO, CW2 ROLAND	RTAITANO
WARNER, LTC RON	JACS_TCC
WESTERBEKE, MR G.	JACS_BI

U.S. Army Recruiting Command

Command Legal Counsel
U.S. Army Recruiting Command
Fort Sheridan, IL 60037-6030
Office DDN Address: USARCLC

U.S. Army Criminal Investigation Command

HQ, USA Criminal Investigation Command
Falls Church, VA 22041
Office DDN Address: CIJA@OPTIMIS.ARPA

Owner	*Username*
CLARK, MR. WES	CLARK
FORD, CW3 MITCHAEL	MFORD
HIGGINBOTHAM, MAJ R	HIGGINBOTHAM
MAUZY, MS SALLY	MAUZY
MCKENNA, CPT MIKE	MCKENNA

U.S. Army Strategic Defense Command

U.S. Army Strategic Defense Command
Huntsville, AL 35807-3801
Office DDN Address: JONESJ

U.S. Army Strategic Defense COMMAND2
Arlington, VA 22215-0150
Office DDN Address: DGRAY

U.S. Army Military Traffic Management Command

Staff Judge Advocate
HQ, Western Area, MTMC
Oakland, CA 94626-5000
Office DDN Address: AABWRM@NARDACVA.ARPA

U.S. Army Materiel Command

Staff Judge Advocate
USA Test & Evaluation Command
Aberdeen Proving Ground, MD 21005-5055
Office DDN Address: AMSTEJA@APG-4.ARPA

Office of the Staff Judge Advocate
HQ, U.S. Army Aviation Systems Command
St. Louis, MO 63120-1798
Office DDN Address: AMSAVJ@AVSCOM.ARPA

Owner	*Username*
DARLEY, COL ROGER	RDARLEY@AVSCOM.ARPA

U.S. Army Military District of Washington

Fort McNair, Washington, DC 20319-5050

Owner	*Username*
CORBIN, CPT MICHAEL	ANJA_AL
PILKINGTON, CW2 DENNIS	ANJA
WATSON, SSG DANIEL	ANJA_CLD4

U.S. Army Training & Doctrine Command

Staff Judge Advocate
HQ, USA Training Center & Fort Jackson
Fort Jackson, SC 29207
Office DDN Address: MTAYLOR

Staff Judge Advocate
HQ, USA Signal Center & Ft Gordon
Fort Gordon, GA 30905-5280
Office DDN Address: WILHITE

Staff Judge Advocate
HQ, USA Infantry Center & Ft Benning
Fort Benning, GA 31905
Office DDN Address: ATZB_JA

Owner	*Username*
KIPI, CPT JEFFERY	ATZB_JALA
LUEDTKE, LTC PAUL	ATZB_JAC
MICK, CPT OLLIE	MICK
NORFOLK, MS ANNE	NORFOLK
PEROLMAN, MAJ GARY	PEROLMAN
PFEIFFER, MR BERNARD	ATZB_JAAL
POWERS, CPT DONALD	DPOWERS
RAUSCHENBERG, CW4 RAY	RAUSCHENBERG

Staff Judge Advocate
HQ, USA Armor Center & Ft Knox
Fort Knox, KY 40121

Office DDN Addresses: ATZK_JA1
ATZK_JA2

Staff Judge Advocate
HQ, USA Chemical & Military Police Center & Ft McClellan
Fort McClellan, AL 36205
Office DDN Address: ATZN_JA

Staff Judge Advocate
HQ, USA Combined Arms Center & Ft Leavenworth
Fort Leavenworth, KS 66027
Office DDN Address: ATZL_JA

Staff Judge Advocate
HQ, US Army Field Artillery Center & Ft Sill
Fort Sill, OK 73503

Owner	*Username*
BAKER, COL JAMES R.	JBAKER
DODGE, CW2 GARY W.	DODGE

U.S. Army Forces Command

Staff Judge Advocate
HQ, Forces Command
Fort McPherson, GA 30330–5000
Office DDN Address: FCJA

Staff Judge Advocate
USA Garrison
Fort Devens, MA 01433
Office DDN Address: AFZD_JAO

Staff Judge Advocate
HQ, USA Garrison
Fort Meade, MD 20755–5030
Office DDN Address: AFZI–JAA

Staff Judge Advocate
HQ, XVIII Airborne Corps & Ft Bragg
Fort Bragg, NC 28307–5000
Office DDN Address: AFZA_JA1

Staff Judge Advocate
HQ, 82d Airborne Division
Fort Bragg, NC 28307–5100
Office DDN Address: AFVC_JA

Staff Judge Advocate
HQ, 24th Infantry Division & Ft Stewart
Fort Stewart, GA 31314
Office DDN Address: AFZA_JA

Staff Judge Advocate
HQ, 101st Airborne Division & Ft Campbell
Fort Campbell, KY 42223
Office DDN Address: AFZB_JA

Owner	*Username*
SCHIEWE, CW2 TIMOTHY	SCHIEWE

Staff Judge Advocate
HQ, 5th Infantry Division & Ft Polk
Fort Polk, LA 71459
Office DDN Address: SALAZAR

Staff Judge Advocate
HQ, US Army Garrison
Fort Sheridan, IL 60037
Office DDN Address: AFZO_JA

Staff Judge Advocate
HQ, III Corps & Ft Hood
Fort Hood, TX 76544
Office DDN Address: AFZF_JA

Owner	*Username*
SEBEK, MICHAEL P.	SEBEK
III CORPS TDS	AFZF_TDS

Staff Judge Advocate
HQ, 1st Cavalry Division
Fort Hood, TX 76545
Office DDN Address: AFVA_SJA

Staff Judge Advocate
2D Armored Division
Fort Hood, TX 76546
Office DDN Address: AFVB_JA

Fort Hood Military Judge: AFZF_MJ

Staff Judge Advocate
HQ, US Army Garrison
Fort Sam Houston, TX 78234
Office DDN Address: AFZG_JA

Staff Judge Advocate
HQ, 7th Infantry Division & Fort Ord
Fort Ord, CA 93941
Office DDN Address: BOULANGER

Staff Judge Advocate
HQ, National Training Center & Ft Irwin
Fort Irwin, CA 92310
Office DDN Address: AFZJ_JA

Staff Judge Advocate
HQ, Presidio of San Francisco
Presidio of San Francisco, CA 94129–5900
Office DDN Address: STRUNTZ

Staff Judge Advocate
HQ, I Corps & Ft Lewis
Fort Lewis, WA 98433–5000
Office DDN Address: AFZH_JAC

Staff Judge Advocate
HQ, 9th Infantry Division & Ft Lewis
Fort Lewis, WA 98433–6000
Office DDN Address: AFVO_JA

Staff Judge Advocate
HQ, US Army South
Fort Clayton, Panama
Office DDN Address: SOJA_A

U.S. Army Europe & Seventh Army

Office of the Judge Advocate
U.S. Army Europe & Seventh Army
APO New York 09403–0109
Individual DDN Addresses: The following individuals have addresses on the USAREUR DDN host computer. E-mail to them should be addressed in the following manner:

MAILER!<USERNAME@USAREUR–EMH.ARPA>

Owner	*Username*
BROWN, MS VIRGINIA	BROWNV
WELSH, CW2 MICHAEL	WELSHM
WHITE, CW3 JOHN	WHITEJ

U.S. Army Korea & Eighth Army

Judge Advocate
HQ, Eighth US Army
APO SF 96301–0009
Office DDN Address: JAJ

Individual Addresses:

Owner	*Username*
ADMIN OFFICE	JAJ-AO@USFK-EMH.ARPA
CRIMINAL LAW OFFICE	JAJ-CL@USFK-EMH.ARPA
ADMIN LAW OFFICE	JAJ-AL@USFK-EMH.ARPA
INTERNATIONAL AFFAIRS OFFICE	JAJ-IA@USFK-EMH.ARPA
OPERATIONAL LAW OFFICE	JAJ-OL@USFK-EMH.ARPA
VI JUDICIAL ADMIN OFFICE	JAJ-JUDICIAL@USFK-EMH.ARPA

USA Forces Claims Service, Korea
APO San Francisco 96301
Office DDN Address: JAJ_CLAIMS@USFK-EMH.ARPA

HQ, USA Element, Combined Field Army
APO San Francisco, CA 96358-0210
Office DDN Address: JAJ_CFA

HQ, 19th Support Command
APO SF 96212-0171
Office DDN Address: JAJ_19SC

HQ, 2D Infantry Division
APO SF 96224-0289
Office DDN Address: JAJ_2

Trial Defense Service
Eighth US Army (Yong San Field Office)
APO SF 96301
Office DDN Address: JAJ-TDS@USFK-EMH.ARPA

U.S. Army Japan

Office of the Staff Judge Advocate
HQ, USA, Japan
Camp Zama Japan
APO SF 96343
Office DDN Address: AJJA

Office of the Staff Judge Advocate
10th Area Support Group
Torrii Station, Okinawa, Japan
APO SF 96331-0008
Office DDN Address: AJGO-SJA@BUCKNER-EMH.ARPA

U.S. Army Corps of Engineers

U.S. Army Engineer Division, Europe
Office of Counsel (CEEUD-OC)
APO New York 09757
Office DDN Address: CORREAT@USAREUR-EMH.ARPA

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1988

July 11-15: 39th Law of War Workshop (5F-F42).

July 11-13: Professional Recruiting Training Seminar.

July 12-15: Chief Legal NCO/Senior Court Reporter Management Course (512-71D/71E/40/50).

July 18-20: 19th Methods of Instruction Course.

July 18-29:116th Contract Attorneys Course (5F-F10).

July 25-September 28: 116th Basic Course (5-27-C20).

August 1-5: 95th Senior Officers Legal Orientation Course (5F-F1).

August 1-May 19, 1989: 37th Graduate Course (5-27-C22).

August 15-19: 12th Criminal Law New Developments Course (5F-F35).

September 12-16: 6th Contract Claims, Litigation, and Remedies Course (5F-F13).

September 26-30: 10th Legal Aspects of Terrorism Course (5F-F43).

October 4-7: 1988 JAG's Annual CLE Training Program.

October 17-21: 8th Commercial Activities Program Course (5F-F16).

October 17-December 21: 117th Basic Course (5-27-C20).

October 24-28: 21st Criminal Trial Advocacy Course (5F-F32).

October 31-November 4: 96th Senior Officers Legal Orientation (5F-F1).

October 31-November 4: 40th Law of War Workshop (5F-F42).

November 7-10: 2d Procurement Fraud Course (5F-F36).

November 14-18: 27th Fiscal Law Course (5F-F12).

November 28-December 2: 23rd Legal Assistance Course (5F-F23).

December 5-9: 4th Judge Advocate & Military Operations Seminar (5F-F47).

December 12-16: 34th Federal Labor Relations Course (5F-F22).

1989

January 9-13: 1989 Government Contract Law Symposium (5F-F11).

January 17-March 24: 118 Basic Course (5-27-C20).

January 30-February 3: 97th Senior Officers Legal Orientation (5F-F1).

February 6–10: 22d Criminal Trial Advocacy Course (5F–F32).

February 13–17: 2d Program Managers' Attorneys Course (5F–F19).

February 27–March 10: 117th Contract Attorneys Course (5F–F10).

March 13–17: 41st Law of War Workshop (5F–F42).

March 13–17: 13th Admin Law for Military Installations Course (5F–F24).

March 27–31: 24th Legal Assistance Course (5F–F23).

April 3–7: 5th Judge Advocate & Military Operations Seminar (5F–F47).

April 3–7: 4th Advanced Acquisition Course (5F–F17).

April 11–14: JA Reserve Component Workshop.

April 17–21: 98th Senior Officers Legal Orientation (5F–F1).

April 24–28: 7th Federal Litigation Course (5F–F29).

May 1–12: 118th Contract Attorneys Course (5F–F10).

May 15–19: 35th Federal Labor Relations Course (5F–F22).

May 22–26: 2d Advanced Installation Contracting Course (5F–F18).

May 22–June 9: 32d Military Judge Course (5F–F33).

June 5–9: 99th Senior Officers Legal Orientation (5F–F1).

June 12–16: 19th Staff Judge Advocate Course (5F–F52).

June 12–16: 5th SJA Spouses' Course.

June 12–16: 28th Fiscal Law Course (5F–F12).

June 19–30: JATT Team Training.

June 19–30: JAOAC (Phase II).

July 10–14: U.S. Army Claims Service Training Seminar.

July 12–14: 20th Methods of Instruction Course.

July 17–19: Professional Recruiting Training Seminar.

July 17–21: 42d Law of War Workshop (5F–F42).

July 24–August 4: 119th Contract Attorneys Course (5F–F10).

July 24–September 27: 119th Basic Course (5–27–C20).

July 31–May 18, 1990: 38th Graduate Course (5–27–C22).

August 7–11: Chief Legal NCO/Senior Court Reporter Management Course (512–71D/71E/40/50).

August 14–18: 13th Criminal Law New Developments Course, (5F–F35).

September 11–15: 7th Contract Claims, Litigation and Remedies Course (5F–F13).

3. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	*Reporting Month*
Alabama	31 December annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines, every three years beginning in 1989
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually beginning in 1989
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually beginning in 1988
Montana	1 April annually
Nevada	15 January annually
New Mexico	1 January annually or 1 year after admission to Bar beginning in 1988
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Oklahoma	1 April annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually
Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For addresses and detailed information, see the January 1988 issue of The Army Lawyer.

4. Civilian Sponsored CLE Courses

September 1988

8–9: ALIABA, Sophisticated Estate Planning Techniques, Boston MA.

9: MBC, DWI and Traffic Law, Springfield, MO.

9–10: BNA, Constitutional Law, Washington, DC.

11–30: NJC, General Jurisdiction, Reno, NV.

13–16: ESI, Federal Contracting Basics, Washington, D.C.

15–16: ALIABA, Bank Regulators, Washington, D.C.

15–17: ALIABA, Chapter 11 Business Reorganizations, Chicago, IL.

16: MBC, DWI and Traffic Law, Kansas City, MO.

18–23: NJC, Medical Evidence, Reno, NV.

23: MBC, DWI and Traffic Law, St. Louis, MO.

23–24: ALIABA, Impact of Environmental Law Upon Real Estate and Other Commercial Transactions, Washington, D.C.

24–30: PLI, Patent Bar Review, New York, NY.

25–29: NCDA, Trial Advocacy, Reno, NV.

25–30: NJC, Search and Seizure, Reno, NV.

26–27: FBA, Equal Employment Opportunity Conference, Washington, DC.

27–30: ESI, Competitive Proposals Contracting, Washington, D.C.

29–30: ALIABA, Municipal Solid Waste: Disposal Strategies, Environmental Regulation, and Contracts and Financing, Washington, D.C.

30–10/1: PLI, Deposition Skills Training Program, New York, NY.

30–10/1: ALIABA, Airline Labor Law, Washington, D.C.

Current Material of Interest

1. ABA Membership Discount Available

The Midyear Meeting of the American Bar Association (ABA) brought good news for government attorneys. The ABA House of Delegates approved a three-year pilot program reducing ABA membership fees by twenty-five percent for full-time judges and government lawyers. Military lawyers on active duty and civilian lawyers in government service are among those eligible for the discount.

ABA dues vary based on the date an attorney was admitted to practice. With the discount, the individual dues structure is: for those admitted less than one year, exempt; one year but less than four, $18.75; four years but less than six, $33.75; six years but less than ten, $67.50; ten years or more, $135.

Further reductions are available for group memberships: five percent for offices with up to fifth attorneys, and ten percent for offices with more than fifty attorneys. To qualify for group reductions, an office must have at least six attorneys and be able to accommodate centralized dues billing and payment.

For further information, write or call:

American Bar Association
Membership Department
750 North Lake Shore Drive
Chicago, IL 60611
(312) 988–5522

2. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

To provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1–100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314–6145, telephone (202) 274–7633, AUTOVON 284–7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Information concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*.

The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B112101	Contract Law, Government Contract Law Deskbook Vol 1/JAGS–ADK–87–1 (302 pgs).
AD B112163	Contract Law, Government Contract Law Deskbook Vol 2/JAGS–ADK–87–2 (214 pgs).
AD B100234	Fiscal Law Deskbook/JAGS–ADK–86–2 (244 pgs).
AD B100211	Contract Law Seminar Problems/ JAGS–ADK–86–1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS–ADA–86–10 (253 pgs).
AD B116100	Legal Assistance Consumer Law Guide/ JAGS–ADA–87–13 (614 pgs).
AD B116101	Legal Assistance Wills Guide/ JAGS–ADA–87–12 (339 pgs).
AD B116102	Legal Assistance Office Administration Guide/JAGS–ADA–87–11 (249 pgs).
AD B116097	Legal Assistance Real Property Guide/ JAGS–ADA–87–14 (414 pgs).
AD A174549	All States Marriage & Divorce Guide/ JAGS–ADA–84–3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/ JAGS–ADA–85–2 (56 pgs).
AD B093771	All States Law Summary, Vol I/ JAGS–ADA–87–5 (467 pgs).
AD B094235	All States Law Summary, Vol II/ JAGS–ADA–87–6 (417 pgs).
AD B114054	All States Law Summary, Vol III/ JAGS–ADA–87–7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/ JAGS–ADA–85–3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS–ADA–85–4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS–ADA–85–5 (315 pgs).
AD B095857	Proactive Law Materials/ JAGS–ADA–85–9 (226 pgs).

AD B116103	Legal Assistance Preventive Law Series/ JAGS–ADA–87–10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/ JAGS–ADA–87–9 (121 pgs).

Claims

AD B108054	Claims Programmed Text/ JAGS–ADA–87–2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS–ADA–84–5 (176 pgs).
AD B087849	AR 15–6 Investigations: Programmed Instruction/JAGS–ADA–86–4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS–ADA–81–7 (76 pgs).
AD B100235	Government Information Practices/ JAGS–ADA–86–2 (345 pgs).
AD B100251	Law of Military Installations/ JAGS–ADA–86–1 (298 pgs).
AD B108016	Defensive Federal Litigation/ JAGS–ADA–87–1 (377 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/JAGS–ADA–87–3 (110 pgs).
AD B100675	Practical Exercises in Administration and Civil Law and Management/ JAGS–ADA–86–9 (146 pgs).

Labor Law

AD B087845	Law of Federal Employment/ JAGS–ADA–84–11 (339 pgs).
AD B087846	Law of Federal Labor-Management Relations/JAGS–ADA–84–12 (321 pgs).

Developments, Doctrine & Literature

AD B086999	Operational Law Handbook/ JAGS–DD–84–1 (55 pgs).
AD B088204	Uniform System of Military Citation/ JAGS–DD–84–2 (38 pgs.)

Criminal Law

AD B095869	Criminal Law: Nonjudicial Punishment, Confinement & Corrections, Crimes & Defenses/JAGS–ADC–85–3 (216 pgs).
AD B100212	Reserve Component Criminal Law PEs/ JAGS–ADC–86–1 (88 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195–8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

3. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Change	Date
AR 11–3	Department of the Army Functional Review		1 Apr 88
AR 11–31	Army International Activities Policy		31 Mar 88
AR 27–10	Military Justice		18 Mar 88
AR 37–1	Army Accounting Guidance		16 Mar 88
AR 95–27	Operational Procedures for Aircraft Carrying Hazardous Materials	1	25 Mar 88
AR 310–2	Identification and Distribution of DA Pubs and Issue of Agency and Commands Administrative Pubs	6	2 Apr 88
AR 600–20	Army Command Policy		30 Mar 88
AR 611–1	Military Occupational Classification Structure Development and Implementation		15 Apr 88
AR 700–142	Materiel Release, Fielding, and Transfer		27 Apr 88
AR 725–50	Requisitioning Receipt and Issue System		15 Apr 88
AR 735–11–1	Uniform Settlement of Military Freight Loss and Damage Claims		1 Jan 88
AR 735–11–2	Reporting of Item and Packaging Discrepancies	1	24 Mar 88
CIR 360–88–1	Annual Meetings of National Service Oriented Organizations		15 Apr 88
CIR 600–88–1	Health Risk Appraisal and Assessment Profile		15 Apr 88
CIR 608–88–1	Voting		1 Apr 88
UPDATE 12	Officer Ranks Personnel		13 Apr 88
UPDATE 13	All Ranks Personnel		16 Mar 88
UPDATE 14	Morale, Welfare and Recreation Update		30 Mar 88

4. Articles

The following civilian law review articles may be of use to judge advocates in performing their duties.

Becker, *Litigating Mental Responsibility Under Article 50a, UCMJ*, 28 A.F. L. Rev. 97 (1988).

Bernott, United States v. Johnson: *The Dissent's Flawed Attack on* Feres v. United States, 21 Creighton L. Rev. 109 (1988).

Bower, *Unlawful Command Influence: Preserving the Delicate Balance*, 28 A.F. L. Rev. 65 (1988).

Buckner, *Help Wanted: An Expansive Definition of Constructive Discharge Under Title VII*, 136 U. Pa. L. Rev. 941 (1988).

Clementi, *Unlawful Command Influence: What Commanders Need to Know*, Mil. Rev., Apr. 1988, at 66.

Dienes, *When the First Amendment Is Not Preferred: The Military and Other "Special Contexts,"* 56 U. Cin. L. Rev. 779 (1988).

Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 Mich. L. Rev. 333 (1987).

Glennon, *Two Views of Presidential Foreign Affairs Power:* Little v. Barreme or Curtiss-Wright?, 13 Yale J. Int'l L. 5 (1988).

Graham, *Evidence and Trial Advocacy: The Impact of* Bourjaily *on Admissions by Coconspirators*, Crim. L. Bull., Jan.–Feb. 1988, at 48.

Griew, *The Future of Diminished Responsibility*, Crim. L. Rev., Feb. 1988, at 73.

Hirsch, *The Militia Clauses of the Constitution and the National Guard*, 56 U. Cin. L. Rev. 919 (1988).

Hoffman, *Court-Martial Jurisdiction and the Constitution: An Historical and Textual Analysis*, 21 Creighton L. Rev. 43 (1988).

Jones, *A Report and Analysis of the Military Mental Non-Responsibility Defense*, 9 Crim. Just. J. 291 (1987).

Kester, *State Governors and the Federal National Guard*, 11 Harv. J.L. & Pub. Pol'y 177 (1988).

Loftus & Schneider, *"Behold With Strange Surprise": Judicial Reactions to Expert Testimony Concerning Eyewitness Reliability*, 56 UMKC L. Rev. 1 (1987).

Recent Case Law on Handicap Discrimination in Employment, Mental & Physical Disability L. Rep., Jan.–Feb. 1988, at 10.

Reisman, *Old Wine in New Bottles: The Reagan and Brezhnev Doctrines in Contemporary International Law and Practice*, 13 Yale J. Int'l L. 171 (1988).

Saltzburg, *National Security and Privacy: Of Government and Individuals Under the Constitution and the Foreign Intelligence Surveillance Act*, 28 Va. J. Int'l L. 129 (1988).

Snyder, *A Due Process Analysis of the Impeachment Use of Silence in Criminal Trials*, 29 Wm. & Mary L. Rev. 285 (1988).

Symposium: In Celebration of the Bicentennial of the United States Constitution, 72 Iowa L. Rev. 1177 (1987).

Symposium, *1787: The Constitution in Perspective*, 29 Wm. & Mary L. Rev. 1 (1987).

Note, *Employer Liability for Sexual Harassment: Inconsistency Under Title VII*, 37 Cath. U.L. Rev. 245 (1987).

Note, *First Amendment Rights of Military Personnel: Denying Rights to Those Who Defend Them*, 62 N.Y.U. L. Rev. 855 (1987).

Note, *Post-Traumatic Stress Disorder: a Controversial Defense for Veterans of a Controversial War*, 29 Wm. & Mary L. Rev. 415 (1988).

*U.S. G.P.O. 1988-201-420:80290

By Order of the Secretary of the Army:

CARL E. VUONO
General, United States Army
Chief of Staff

Official:

R. L. DILWORTH
Brigadier General, United States Army
The Adjutant General

Distribution. Special.

Department of the Army
The Judge Advocate General's School
US Army
ATTN: JAGS-DDL
Charlottesville, VA 22903-1781

Official Business
Penalty for Private Use $300

SECOND CLASS MAIL
POSTAGE AND FEES PAID
DEPARTMENT OF THE ARMY
ISSN 0364-1287